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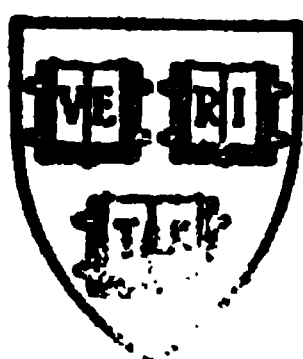
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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF

MISSISSIPPI

AT THE

OCTOBER TERM, 1911; MARCH TERM, 1912.

VOL. 101

REPORTED BY

ROBERT POWELL

COLUMBIA, MISSOURI

E. W. STEPHENS PUBLISHING COMPANY

LAW PUBLISHERS

1913

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

MARCH TERM, 1910.

CUMBERLAND TELEPHONE & TELEGRAPH Co. v.
J. F. WILLIAMSON.

[57 South. 559.]

1. **CHANCERY JURISDICTION.** *Multiplicity of suits. Community of interest. Injunction.*

The jurisdiction of equity to prevent a multiplicity of suits does not extend to enjoining a number of separate suits at law against the same defendant to recover damages, where the plaintiffs have no community of interest, except in the questions of law and fact involved.

2. **SAME.**

In order for equity to take jurisdiction upon the ground of multiplicity of suits, there must be some recognized ground of equitable interference or some community of interest in the subject-matter, or a common right or title involved to warrant the joinder of all in one suit or there must be some common purpose in pursuit of a common adversary, where each may resort to equity, in order to be joined in one suit.

101 Miss.]

(1)

101 Miss.—1

3. SAME.

Where there is an injury continuing in its nature, which results in the bringing of numerous suits against a person, equity will intervene to prevent a multiplicity of suits.

APPEAL from the chancery court of Panola county.

HON. I. T. BLOUNT, Chancellor.

Suit by Cumberland Telephone & Telegraph Co., against J. F. Williams et al. From a decree dismissing the bill complainants appeal.

The facts are fully stated in the opinion of the court.

Harris & Potter and *Tim. E. Cooper* for appellant.

We take it that the third and fourth grounds of the motion for the dissolution of the injunction are intended to present the same objection to the jurisdiction of the equity court, viz., that the plaintiffs in the action at law had demanded punitive damages, which damages, it is now said, will not be awarded by a court of equity, wherefore, relief which a court of equity would ultimately give if the defendants to the present suit were found entitled to damages, would not be as full and complete as they might recover at law. This objection is fully answered by the fact that the precise question has been distinctly decided by this court. *Whitlock v. Railroad*, 91 Miss. 779.

In that case fifty plaintiffs had brought suit against the railroad company in actions of tort and in each case actual and punitive damages were demanded.

Ordinarily of course, courts of equity do not entertain suits for torts. But it is the settled law of this state by this decision, that to prevent a multiplicity of suits, a court of equity will draw to its jurisdiction actions of tort brought by many plaintiffs, each seeking both actual and punitive damages.

In *Tisdale v. Insurance Companies*, 84 Miss. 709, one plaintiff had brought suit against three disconnected defendants on three separate policies of insurance. The

contracts were, of course, independent and unrelated. It was held in that case that these separate defendants might enjoin the prosecution of the several suits and transfer the whole cost to an equity court, the court saying: "The property insured was the same, and the principles of law governing the three cases were the same, and the facts were substantially identical."

In *Railroad v. Garrison*, 81 Miss. 257, actions of tort had been brought against the railroad company by seven individuals. The actions seem to have been based upon the obstruction of the valley of Bear Creek by the railroad company. Judge Whitfield, in delivering the opinion of the court, said: "In every one of these cases—past, present and future—the liability of the railroad company depends upon whether it has properly constructed its railroad. The determination of that question will settle all cases so long as the embankment remains unchanged in its condition. Here there is plainly a "common right" asserted by the railroad against all these various parties, and *Tribette v. Railroad* in such case, maintains the jurisdiction. Surely on these facts, the jurisdiction of the chancery court to convene all the parties in one suit, and to determine therein the single question on which liability, past, present and future depends, so as to prevent this endless multiplicity of suits with its attendant useless consumption of time and costs, is too well settled by modern authorities to be doubted."

Shands & Montgomery for appellee.

Equity will never enjoin on the ground of multiplicity of suits, unless it be made to appear that equity can enforce all remedies and grant all rights which could be secured, if several suits could have been prosecuted to conclusion. 16 Cyc. 61; 48 C. C. A. 517.

It is true that no plaintiff has a right to punitive damages as a matter of law; but he has a right to have a

jury say under proper instructions, whether or not they will award punitive damages in a given case, if there be any evidence of oppressive conduct. Under the facts stated in the pleadings in this case, a circuit judge would submit the case to a jury under proper instructions authorizing the infliction of punitive damages. If this is true, and the appellees are denied the right of having this question submitted to the jury, by reason of an injunction and the consequent removal of the causes to a court of equity then the relief given them by a court of equity is not as full as they could have had at law, and the record does not present a proper case for interposition on the ground of multiplicity of suits. In no state of case are punitive damages recoverable in a court of equity. *Freeman's Note*, 28 A. S. R. 874, past paragraph; *Bird v. Railroad*, 64 Am. Dec. last paragraph opinion of court, page 746; *Sanders v. Anderson*, 10 Rich. Eq. (South Car.) 232; *Livingston v. Wordworth*, 14 U. S. (Law Ed.) 809.

The Mississippi court has followed this doctrine, even as to the jurisdiction of a court of equity to collect a penalty. *Railroad Commission v. Railroad*, 78 Miss. 750.

Appellant in its brief says this question was directly presented in the Whitlock case, reported in 91 Miss. 779. But we respectfully beg leave to differ from him. In that case a bill was filed which set out a good defense to each case sought to be enjoined, and showed that if the allegations of that bill were taken as true, that there was no right in plaintiffs to recover punitive damages. There was no answer filed in that case as in this, but a demurrer was interposed to the bill, which admitted the truth of every allegation of complainant's bill, among others admitting the allegation that complainant had a perfect defense to all the actions at law sought to be enjoined. The court could have rendered no other decision than it did render in the Whitlock case, as defend-

ant's demurrer admitted the truth of every allegation necessary to give a court of equity jurisdiction in a case of this character. But the court will notice that the power of a court of equity to inflict punitive damages was not raised in any of the briefs nor assignment of errors, nor was it adverted to by the court in its opinion. It was not an issue in that case.

Argued orally by *Tim E. Cooper* for appellant and *A. W. Shands* for appellee.

McLEAN, J., delivered the opinion of the court.

J. F. Williamson and three other parties each brought separate and independent suits against the Cumberland Telephone & Telegraph Company. These were actions of tort, brought at law, for the recovery of damages, both actual and punitive. Each declaration alleged that the plaintiff therein was a subscriber to a local telephone company, doing business in Sardis, Panola county, known as the "Rural Telephone Company;" that the Cumberland Telephone Company purchased the plant of the Rural Telephone Company, and that then the Rural Company went into liquidation, and that subsequently the Cumberland Telephone Company continued to serve the plaintiff as before; that later it willfully, wantonly, oppressively, and in reckless disregard of the plaintiff's rights, removed the telephone from the residence of the plaintiff, disconnected the plaintiff with the Sardis exchange, and has since refused to give the plaintiff telephone service. The Cumberland Telephone Company filed its bill of complaint in the chancery court of Panola county, praying for an injunction against the suits at law, on the ground that there was a community of interest in the principles of law and fact involved in the controversy, and that equity would take jurisdiction in order to prevent a multiplicity of suits. The injunction was granted, and thereafter, upon motion, the injunction was dissolved, and at

a subsequent term of the chancery court the bill was dismissed. From a dismissal of the bill, this appeal is prosecuted.

Within comparatively recent years there have grown up in this country what may be termed two schools upon the subject of the jurisdiction of equity relative to a multiplicity of suits. One may be termed the "school of Pomeroy," and, with great deference to Prof. Pomeroy and his disciples, it may be said that this school in many instances, while disclaiming, yet has confounded and confused the doctrine of a "multitude" with a "multiplicity" of suits. They have ignored entirely the fundamental principle that, in order for a court of equity to acquire jurisdiction in such cases, there must be something more than a community of interest in the questions of law and fact involved in the judicial controversy. The question has been so fully and ably discussed by the respective adherents that nothing new upon the subject can be added, and we will content ourselves by simply referring to a few of the many leading decisions upon this question.

The leading case in America combating what may be termed the heresy of Prof. Pomeroy, is *Tribette v. Railroad*, 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642, wherein Chief Justice Campbell enters fully into the subject, and demonstrates conclusively the unsoundness of Prof. Pomeroy's doctrine—not only by showing that the authorities relied upon by Prof. Pomeroy do not support and sustain him, but that this author's reasoning is totally unsound. We have taken the pains to examine all of the cases relied upon by that author and cited in the second edition of his most valuable and excellent treatise, and we unhesitatingly concur with Judge Campbell, as stated in the *Tribette case, supra*, that "every case he cited to support his text will be found to be either where each party might have resorted to chancery or be proceeded against

in that forum, or to rest on some recognized ground of equitable interference other than to avoid a multiplicity of suits." In notes to *Southern Steel Co. v. Hopkins*, reported in 20 L. R. A. (N. S.) 850, the annotator, referring to Pomeroy's statement, says that "a search fails to reveal any case which on the facts sustains the proposition, if applied to actions for breach of contract or the commission of a tort, and Pomeroy cites no such case." While Prof. Pomeroy is not the originator of the doctrine of a multiplicity of suits, he is certainly the expounder and expander of this doctrine, and has certainly carried this most desirable and salutary principle beyond the limits and scope of the judges who first conceived the idea.

The opinion in *Tribette's case, supra*, has received the unqualified approval of the leading text-writers, among them being High on Injunctions, Beach on Injunctions, and Bliss on Code Pleading, and of many courts of last resort, and it may justly be regarded as the leading case upon the subject, and is in accord with the weight of judicial authority, both ancient and modern. Owing to the great reputation of Prof. Pomeroy, and the profound impression which his work on Equity Jurisprudence produced upon the judiciary and the legal profession generally, it seemed at one time as if the doctrine which he advocates so ably and forcefully would be generally accepted; but the second sober thought of the profession was arrested by the masterful and unanswerable opinion of Chief Justice Campbell in the *Tribette case, supra*, and, from the present trend of judicial thought, the judicial compass once more points in the right direction. In fact, in the third edition of Pomeroy's Equity there are added two new sections, 251½ and 251¾, wherein there is quite a recession from the unqualified statements made in the former editions. A full discussion of this question may be found in the valuable notes in the following authorities: 14 L. R. A.

(N. S.) 239; 28 L. R. A. (N. S.) 743; 32 L. R. A. (N. S.) 940; 34 L. R. A. (N. S.) 897. An examination of these notes will disclose that the cases which Mr. Pomeroy relied upon as supporting his text do not justify such a conclusion.

It is certainly a very difficult question to decide when equity will enjoin actions at law, in order to prevent a multiplicity of suits. The rule seems to be well settled in the federal courts that there is no hard and fast rule upon the subject. *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380, and authorities cited. And it is settled beyond all controversy by these authorities that "the single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not enough in all cases to sustain it. It might be that the exercise of equitable jurisdiction on this ground, while preventing a formal multiplicity of suits, would nevertheless be attended by more and deeper inconvenience to the defendant than would be compensated for by the convenience of a single plaintiff; and where the case is not covered by any controlling precedent the convenience might constitute good ground for denying jurisdiction." The origin of the doctrine of a multiplicity of suits can be traced to what are called "bills of peace," and those in the nature of bills of peace. Bishpam's *Principles of Equity* (7th Ed.), page 573; Kerr on *Injunctions*, 586; Adams' *Equity*, 199; Pomeroy's *Equity Jurisprudence*, sec. 246; *Sharon v. Tucker*, 144 U. S. 533, 12 Sup. Ct. 720, 36 L. Ed. 532. To enter into a discussion of these bills of peace would simply be a rehearsal of what can be learned from any treatise on the subject of Equity Jurisprudence, and hence we refrain from doing so.

Our conclusion is that, in order for equity to take jurisdiction upon the ground of a multiplicity of suits, there must be some recognized ground of equitable interference, or some community of interest in the sub-

ject-matter, or a common right or title involved, to warrant the joinder of all in one suit, or there must be some common purpose in pursuit of a common adversary, where each may resort to equity in order to be joined in one suit. What is and what is not a community of interest is well settled in *Tribette v. Railroad*, *supra*, quoting, from Bliss on Code Pleading as follows: "Two or more owners of mills propelled by water are interested in preventing an obstruction above that shall interfere with the downflow of water, and may unite to restrain or abate it; but they cannot unite in an action for damages, for as to the injury suffered there is no community of interest." In *Madison v. Ducktown Iron Co.*, 113 Tenn. 331, 83 S. W. 658, it is said that, where several persons acting independently combine to produce a nuisance, such persons may be joined as defendants in a suit for injunction. 14 Ency. Pl. & Pr. 1141; *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *People v. Gold Run Mining Co.*, 66 Cal. 138, 4 Pac. 1152, 66 Am. Rep. 80; *Kingsbury v. Flowers*, 65 Ala. 479, 39 Am. Rep. 14. But there can be a joinder neither of complainants nor defendants for the purpose of recovering damages for the injuries by the nuisance. *Saddler v. Great Western Railroad Co.*, 2 Q. B. 688, and Adams' Equity, 199. In 2 Story's Equity Jurisprudence, 855 *et seq.*, it is said that this right must be a common right, enjoyed in common by several persons, and in such a manner that the invasion of the right of one is really an invasion of the rights of all, such as a right of fishery. See *Vandalia Co. v. Lawson*, 43 Ind. App. 226, 87 N. E. 47, for a full discussion, in which it is said: "Such strict community of interest in the subject-matter in these cases (referring to instances where the injury is a continuing one) is not required, and they must be taken as stating a qualification to the general rule that a community of interest in the subject-matter is necessary or harmonized therewith by considering that the continuing nature

of the injury as against them all constitutes such community of interest.”

Where there is an injury continuing in its nature, which results in the bringing of numerous actions against a person, equity has intervened to prevent a multiplicity of suits. This is illustrated by the opinion of this court in *Illinois Central Railroad Co. v. Garrison*, 81 Miss. 257, 32 South. 996, 95 Am. St. Rep. 469, which is expressly distinguished from the principle laid down in *Tribette v. Illinois Central Railroad Co.*, *supra*—the distinguishing difference being the continuing nature of the injury, and the principle announced in *Tribette*’s case was expressly recognized. This distinction was also clearly drawn by this court in *Mills v. New Orleans Seed Co.*, 65 Miss. 391, 4 South. 298, 7 Am. St. Rep. 671, wherein the court says: “Where trespass to property is the single act, and is temporary in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere. But if the trespass is continuous in its nature, and repeated acts of trespass are done or threatened, although each of such acts taken by itself may not be destructive or inflict irreparable injury, and the legal remedy therefor be adequate for each single act if it stood alone, the entire wrong may be prevented or stopped by injunction.” In *Ducktown Sulphur Co. v. Fain*, 109 Tenn. 56, 70 S. W. 813, the *Tribette* case was considered by that court and approved; and the Tennessee court held that a court of equity should not take jurisdiction to restrain actions at law by different property owners for damages for a nuisance, and dispose of the matters involved in such suits in a single action on the ground of preventing a multiplicity of suits. In *Boise Artesian Co. v. Boise City*, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796, it is said: “A court of equity ought not to interfere upon the ground of a multiplicity of suits by the same person against the complainant arising out of the

same facts and legal principles, unless it is clearly necessary to protect the complainant against *continued* and vexatious litigation." See, also, *Boston & M. R. R. v. Sullivan*, 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275.

One of the most illuminating decisions upon this question rendered in recent times is *Turner v. Mobile*, 135 Ala. 73, 33 South. 132. After giving to this question a searching and exhaustive investigation, Chief Justice McClellan says: "It would seem to be an elementary and fundamental proposition that a party who seeks to come into equity must himself have an equity. His equity may be derivative. It may rest in him because of privity between him and others by force of contract or in estate; but, however it comes to him, it must exist in him, or he cannot maintain a bill. Where his title is legal, where his defense is at law, where all his rights, remedies, and defenses are answerable in a legal forum, and he therefore has in his own capacity and right no standing in a court of chancery, it is altogether plain and clear to us, Mr. Pomeroy and some courts to the contrary notwithstanding, that the wholly fortuitous, accidental, and collateral fact that numerous persons have like, but entirely independent and disconnected, legal rights or defenses, cannot, upon any conceivable principle, invest him with any right, legal or equitable, and that his rights, whatever they may be, are precisely the same as if no other person had similar rights. It is palpably illogical to say that one man may acquire rights of any sort from others with whom he has absolutely no connection or relationship by blood, in estate, or by convention. It is a palpable *non sequitur* to say that, when numerous persons have like, but independent, legal estates or legal rights, in respect of which severally they have no right to invoke the jurisdiction of chancery, yet, because they are numerous, the separate legal right of each is metamorphosed into an equity right in

all, or in one for all. Jurisdiction in equity is not entertained on any notion that the court has an equity—that it will take jurisdiction to prevent a multiplicity of suits, in order to lessen its own labors or those of other courts. The equity upon which the invocation is made must reside in the party making it. When numerous parties have each the same equity, they may in a proper case unite in one bill for its declaration and effectuation. Each having the separate right to come into equity upon an identical ground, they will be allowed to come in together, on the theory of preventing a multiplicity of suits.” It is true that this case was subsequently overruled by the same court in *Southern Steel Co. v. Hopkins*, 157 Ala. 175, 47 South. 274, 20 L. R. A. (N. S.) 843, 131 Am. St. Rep. 20; but it must be conceded that the court in the later case signally failed to refute the unanswerable argument made by the court in *Turner v. Mobile*, *supra*. Another recent and unusually well considered case is *Vandalia Coal Co. v. Lawson*, 43 Ind. App. 226, 87 N. E. 47, *et seq.* wherein this question is taken up and discussed in its various phases, and the principle in the Tribette case affirmed. We feel that we can add nothing to what has been said in the cases hereinbefore referred to.

The case of *Crawford v. M., J. & K. C. R. Co.*, 83 Miss. 708, 36 South. 82, 102 Am. St. Rep. 476, is not at all inconsistent either with the Tribette case, *supra*, or with the opinion which we herein announce. In that case fifty-seven different persons joined in executing notes for the amount of thirty-five thousand dollars. The execution of the notes grew out of the same transaction, but their validity depended upon the same identical principles of law, and the bill specifically charged that those notes were procured through fraud, and prayed that the notes be surrendered and canceled. The allegation that the notes were procured through fraud, and the prayer for surrender and cancellation thereof, gave the court

of equity jurisdiction. The same may be said of *Pollock v. Okolona Savings Institution*, 61 Miss. 293. It is true that the court in that case seemed to rest its decision upon the authority of Mr. Pomeroy, yet the real ground upon which the court of equity assumed jurisdiction was that that was a case peculiarly of equity jurisdiction, independently of the question of a multiplicity of suits. Murdock & Parchman, a mercantile firm, becoming insolvent, executed a deed of general assignment, wherein they transferred to the assignee all of their property, real and personal, with directions to sell the same and with the proceeds to pay off their debts, making some of their creditors preferred and others unpreferred. Several of the unpreferred creditors sued out attachments at law against the assignors, upon the ground that the deed of assignment was fraudulent, and had the same levied on the goods in the hands of the assignee, and had writs of garnishment served for the Okolona Company and upon Black, the assignee. The Savings Bank of Mobile, which was one of the creditors, in addition to suing out its attachment and garnishment writs, also filed a bill in the chancery court attacking the deed of assignment as fraudulent in law upon its face. The Okolona Savings Bank, the garnishee in all these attachment proceedings and the defendant in the chancery suit brought by the Mobile Bank, under these circumstances filed a bill in chancery, the object of which was to enjoin the further prosecution of the attachments at law, the adjudication of the rights of all the parties by one decree, and the establishment of its own right to set off against the deposit standing on its books to the credit of Black, assignee, its own debt against Murdock & Parchman, the assignors, which exceeded in amount the sum of the deposit. This is a statement of the case as found in the opinion of the court. It is clear and manifest from this statement that a court of equity had jurisdiction of these matters, independently of any question of a multiplicity of suits.

The erroneous doctrine of Prof. Pomeroy finds its apotheosis in *Whitlock v. Railroad*, 91 Miss. 779, 45 South. 861. In that case the court says: "It is clearly and thoroughly settled by the best-considered modern decisions in this state and elsewhere that such jurisdiction extends in all cases of this character, referring alone to the following: *Railroad v. Garrison*, 81 Miss. 264, 32 South. 996, 95 Am. St. Rep. 469; *Crawford v. M., J. & K. C. R. R.*, 83 Miss. 708, 36 South. 82, 102 Am. St. Rep. 476; *Pollock v. Okolona Savings Bank*, 61 Miss. 293." We have heretofore shown in this opinion that neither of these cases referred to in the *Whitlock* case is an authority for the principle so announced. The facts in the *Whitlock* case were these: Some fifty-odd persons each brought separate and distinct suits for damages against a railroad company. These were actions of tort, wherein both actual and punitive damages were claimed. The railroad company filed its bill of injunction, praying the chancery court to take jurisdiction upon the ground that the same principles of law and the same state of facts existed in each case, and the court sustained the bill in order to prevent a multiplicity of suits. After a careful and exhaustive research we have found but one case like it, and that is the case of *Southern Steel Co. v. Hopkins*, 157 Ala. 175, 47 South. 274, 20 L. R. A. (N. S.) 848, 131 Am. St. Rep. 20. In both of these cases the court entirely ignored the rights of each of these plaintiffs in the suits at law to have his suit determined upon its own merits, free and untrammelled, and independent of the suits of the other plaintiffs. The damages of each of the plaintiffs were necessarily different, and each plaintiff was necessarily compelled to establish his damage by altogether different testimony. In the chancery court, therefore, there was one suit, with a multitude of issues, these issues being separate and distinct, so far as the damages of the several plaintiffs at law were concerned, and a court of chan-

cery is not the forum in which such damages should be ascertained. As is said in *Tribette v. Railroad, supra*: "The recovery of damages for a tort or breach of contract does not pertain to courts of chancery, which decree damages only in a very limited class of cases and under peculiar circumstances, or as an incident to some other relief." 1 Pomeroy's Equity Jurisprudence, sec. 112; Story's Equity, sec. 790. The machinery of a court of equity is totally inadequate in such cases to further the ends of justice. The giving to chancery courts of the power to enjoin actions at law upon the sole ground of preventing a multiplicity of suits has opened up a perfect Pandora's box, and the practice has become quite common in this state that when one person is sued by two or more persons in actions of tort, where there is merely a community of interest in the questions of law and fact involved, and where there is no common title, and no community of interest or of right in the subject-matter, for the court of chancery to acquire jurisdiction. The evils resulting from this practice are too numerous to mention.

The usurpation upon the part of the chancery court is too flagrant for further discussion.

Since the preparation of the foregoing opinion, we have read with profit the recent opinion of the supreme court of Alabama in *Southern Steel Co. v. Hopkins*, 57 South. 11, wherein the Alabama court reconsiders its former opinion in this case as found reported in 157 Ala. 175, 47 South. 274, 20 L. R. A. (N. S.) 848, 131 Am. St. Rep. 20, and overrules the former opinion, and re-establishes in Alabama the doctrine announced in *Turner v. Mobile*, 135 Ala. 73, 33 South. 132. This recent opinion of the Alabama court is not only an exceedingly able one, and a valuable contribution to this subject, but it squarely affirms the rulings of this court in *Tribette v. Railroad, supra*, and we quote from that opinion the following: "We base our conclusion chiefly

upon the Tribette case, which we concede to be the leading authority in the world upon the question of the jurisdiction of equity to prevent a multiplicity of suits. It has been reprinted time and again, and copied into the latest editions of most of the text-books upon the subject as stating the true doctrine.” *Affirmed.*

Suggestion of error filed and overruled.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

MARCH TERM, 1911.

ALICE HAWKINS v. ELIZA DUBERRY.

[57 South. 919.]

1. WILLS. *Codicil. Revocation. Insurance. Beneficiaries. Section 5079, Code 1906.*

A codicil to a will not being subscribed and witnessed as required by law is invalid and does not affect the validity of the will since Code 1906, section 5079 provides that a "demise or any clause thereof shall not be revocable but by the testator or testatrix, destroying, cancelling or obliterating the same, or causing it to be done in his or her presence or by a subsequent will, codicil or declaration in writing made and executed."

2. INSURANCE. *Beneficiaries. Wills.*

A person insured in a mutual benefit association cannot make a valid bequest of the benefits, to one who does not belong to the class of persons who are authorized to become beneficiaries under the laws, constitution and charter of such order.

APPEAL from the chancery court of Yalobusha county.
HON. I. T. BLOUNT, Chancellor.

101 Miss.]

(17)

101 Miss.—2

Suit by Eliza Duberry against A. Seymour, administrator with will annexed of the estate of John W. Duberry and Alice Hawkins. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Creekmore & Stone, for appellant.

In the light of the above facts fully proved and uncontradicted we are at a loss to know on what theory the chancellor disregarded the plain and unequivocal provisions of the instrument executed by John Duberry. The case of *Hall v. Allen*, 75 Miss. 175, 22 So. 4, absolutely settles the point that the act of an insured person in disposing of the proceeds of an insurance policy in a fraternal organization does not have to be given any particular name and involves no certain form of procedure. The act of John Duberry had a certain legal effect and operation, by what ever name called, and this effect is directly in opposition to the appellee's case.

We cannot see on what possible theory of this case the chancellor admitted the book containing the by-laws and constitution of the grand lodge of the insurance company. This for two reasons: first—even if properly proved this book was absolutely inadmissible in this case. The insurance company had admitted their liability and by paying the money into court had subjected it to the contest between rival claimants, with this latter fight the company had nothing to do and certainly none of their rules and regulations would be admissible. Second—even if it were admitted that the book of by-laws could be considered, we see no application of the same to the case at bar. So far as we have seen the company makes no effort to restrict the insured in the disposition of the benefits of their policy, and such effort would be void if attempted.

There is only one thing further to be said. Complainant and appellee would like to make an argument on

sentimental grounds, that is to get the court to declare that it would not stand by a deceased's disposition of property, unless the same, no matter how closely in accordance with the form of law, did not happen to accord with the moral ideas of the court. Appellee and John Duberry had discarded each other many years before the instrument was executed. While courts will attempt to make a disposition of a man's property for him, on sentimental or other lines, we say that there is nothing in this record that would even slightly commend the appellee to any such consideration. There is such an entire absence of anything of this sort that we will not prolong this brief with a discussion of it.

This case has been fully heard and we earnestly insist that the judgment of the learned chancellor should be reversed, and we submit that this is a proper case for this court in reversing to render a final decree. We respectfully ask that the case be reversed and the original bill dismissed.

W. C. Blount, for appellee.

The case of *Hall v. Allen*, 75 Miss. 175, has no application to this controversy. That was an assignment pure and simple by a brother to a sister, which the court upheld. Here it is attempted to establish a will in favor of a dissolute woman, with no blood or other tie upon decedent, who though present in court would not dare subject herself to cross-examination by appellee's counsel; and the paper was treated as a will by appellant and she claims under it only as a will, and claimed to have had it probated as such. It is clearly submitted as a will, counsel having waived technical pleadings and agreeing to treat this litigation as a proceeding in lieu of an issue *devasavit vel non*.

The proof shows that there was no "Alice Hawkins" until several days after the death of John W. Duberry. How could "Alice Hawkins" then be made beneficiary

or assignee. This sustains the widow Eliza Duberry in her testimony when she says the hand writing, "Alice Hawkins \$699 Eliza Duberry \$1.00 this is my last will. Dec. 31, 1907," in the document was not Duberry's handwriting.

The court decided in *Bank v. Williams*, 77 Miss. 398, that a life insurance policy, designating a beneficiary, is the property of the beneficiary from the moment of its issuance, whether delivered or not, and the procurer of the insurance cannot, without the beneficiary's consent, transfer it to another.

The constitution of the M. W. Stringer Grand Lodge, article 1, amendment 1, section 2 (see page 29 of constitution), restricts the issuance of this fraternal insurance to the "the widow orphans or legal representative of deceased." This question was not presented nor was it considered by the court in *Hall v. Allen*, *supra*, where a brother assigned a life insurance policy to his sister, the original beneficiary, his mother, being dead.

Again we say, to give this money to a concubine, disinheriting the widow would be a travesty on justice and without reason or law. The widow was the legal beneficiary in the policy, the same as if her name had been written there instead of that of her husband John W. Duberry, and although with her husband at the time of his death she was not even asked to give her consent to a transfer nor apprised of the fact that such an attempt had been or would be made until many months after his death.

McLEAN, J., delivered the opinion of the court.

The appellee, Eliza Duberry, filed her bill in the chancery court of Yalobusha county against A. Seymour, administrator *cum testamento annexo*, and Mrs. Alice Hawkins, wherein she alleges that she is a resident citizen of Tennessee; that her husband, John W. Duberry, died in Memphis, Tenn., on February 12, 1908, leaving com-

plainant as his wife and sole heir at law; that said deceased left an insurance policy in the Masonic Benefit Association of the value of six hundred and eighty-five dollars, which amount had been paid to Seymour, administrator, etc.; that this money belongs to complainant, but that Seymour declines to pay it to her, because Mrs. Alice Hawkins claims to be the owner of the money by virtue of an alleged will executed by said decedent, which alleged will complainant charges is void and of no effect in form and substance. One of the grounds of the invalidity of the will is that there was no such person in existence as Mrs. Alice Hawkins at the date of the death of the said John W. Duberry. The allegations of the bill are denied by the answer, except that it admits that the money has been paid by the lodge and collected by Seymour as administrator, etc.

On the 18th of January, 1905, the Masonic Benefit Association issued its benefit certificate to John W. Duberry, of Water Valley, Miss., wherein it agreed to pay to said Duberry upon his death five hundred dollars upon certain conditions. Said John W. Duberry on the bottom of this certificate made and executed his last will and testament, wherein he gave and bequeathed the money due him by virtue of the certificate unto Mrs. Alice Hawkins. This will was properly attested by three subscribing witnesses. The will is in the following language: "I, Jno. W. Duberry, of Water Valley, Mississippi, age fifty-nine years, being of sound and disposing mind, give and bequeath the money due me by virtue of the certificate upon which this my last will is indorsed: Mrs. Alice Hawkins, \$699.00; Eliza Duberry, \$1.00. And this is my last will. December 31, 1907. [Signed] J. W. Duberry." Beneath this will is the following: "In witness whereof I, this the 18th day of November, 1905, sign, publish and declare this instrument as my last will so far as the money is concerned which is due me after my death from the Masonic Ben-

efit Association. I appoint Mr. N. Cox executor. [Signed] Jno. W. Duberry." The execution of this will was attested in due form by three witnesses; said attestation being as follows: "State of Mississippi, Yalobusha County. The said John W. Duberry, on the 18th day of November, 1905, signed the foregoing instrument, and published and declared in our presence and in the presence of each other as his last will; and we at his request and in his presence, and in the presence of each other, on said date, have hereunto written our names as subscribing witnesses thereof." And then follows the names of the three witnesses.

It appears from the testimony of one Noah Cox that he was in Memphis on December 31, 1907, at the house of Mrs. Alice Hawkins, and that the testator said that he had consulted a lawyer, who informed him that, if he did not give his wife, Eliza something, she might give trouble by breaking the will, and that in order to avoid this the said John W. Duberry added to the will, in his own handwriting, the following after the word Alice Hawkins: "\$699.00; Eliza Duberry, \$1.00." There were no subscribing witnesses to this addition. In answer to the question, "It was not his intention, then, to give Alice Hawkins the total and Eliza Duberry nothing?" the witness said, "In the original first signed, he willed it all to Alice Hawkins, and when I called on him in December, 1907, he called my attention to it, and said he had consulted some lawyer, who said, if he did not give Eliza something, she might give trouble by breaking the will." It does not appear from the record whether this will was probated, but the witnesses refer to the will as having been probated, and the bill of complaint filed in this case attaches, as an exhibit to it, a copy of what is called the alleged will. There is nothing in the record to show that the widow, who is complainant in this cause, ever renounced this will. There is some evidence in the record to the effect that John

W. Duberry, for some two years prior to his death, resided in Memphis, Tenn.; but we cannot say from this record whether he was a resident and citizen of Tennessee or Mississippi at the date of his death. The record further shows that there is an agreement between counsel for both complainant and defendant that all questions involved in the settlement of this case include the construction of the paper presented, and the rights of the parties thereunder are submitted to the court for its decision, waiving the jury on an issue of *devisavit vel non*; but this is not signed by any one. The record shows that the Masonic order paid the money to Seymour, who is described as administrator *cum testamento annexo*. The caption of the constitution of the Masonic Benefit Association is in the record; but there is nothing in the record to show the purpose of the organization, nor the persons who can become beneficiaries under the constitution, except there purports to be a copy of an amendment to one of the articles of association, which proposes "to provide a fund to be paid to the widow, orphans, or legal representatives of deceased Master Masons within the jurisdiction of the M. W. Stringer, Grand Lodge of Mississippi." The court below held that the paper purporting to be the last will and testament of J. W. Duberry is not a will, and does not entitle defendant to the moneys in controversy, and finds in favor of Elizabeth Duberry, as being the rightful heir at law of John W. Duberry, deceased, and entitled to the money in controversy.

We are not at all satisfied with the result in the lower court. It is manifest from the evidence that this was a valid will. It was properly executed and attested, and if it be true that on December 31, 1907, he added to the then valid will the words and letters, to-wit, "\$699.00; Eliza Duberry, \$1.00," without having it properly attested, the failure to have this addition attested would not destroy the otherwise valid instrument. The rule

is that if the will is valid, and properly attested, and if thereafter the testator should undertake to make a codicil, and the codicil is invalid for the want of the proper attestation, the invalid codicil will not destroy the otherwise valid will. The law is that an instrument propounded as a revocation, if it be in form a will, must be perfect as such, and be subscribed and attested as required by the statute; hence an instrument intended to be a will, but failing of its effect as such on account of some imperfection in its structure, or for want of due execution, cannot be set up for the purpose of revoking a former will. This principle is well settled by the decisions, not only in the English courts, but by those in America. *Hairston et al. v. Hairston et al.*, 30 Miss. 303. Again, this court in *Wilbourn v. Shell*, 59 Miss. 205, 42 Am. Rep. 363, in discussing when and under what circumstances there is a revocation of the will, speaking through that eminent jurist, Judge Cooper, says: "But the material inquiry in all cases is whether the destruction of the will was *animo revocandi*, and to determine this it is necessary to consider the circumstances under which and the purposes and reasons for which it was destroyed; and where, from all the circumstances in evidence, it appears that the destruction or revocation was connected with, or cause of, the execution of another will, and that the testator meant the revocation of the one to depend upon the validity of the other, then if the latter will is inoperative, from defect of attestation or other cause, the revocation fails also, and the original will remains in force." Our statute (section 5079 of the Code of 1906), which is a rescript of section 4489 of the Code of 1892, provides for revocations as follows: "A devise so made, or any clause thereof, shall not be revocable but by the testator or testatrix destroying, canceling or obliterating the same, or causing it to be done in his or her presence, or by subsequent will, codicil, or declaration, in writing made and executed."

It is proper for us to say that if the legatee or beneficiary under the will, Alice Hawkins, did not belong to that class of persons who were authorized to become beneficiaries under the laws, constitution, and charter of the Masonic Benefit Society, then she is not entitled to the money, as held by this court in *Rose v. Wilkins*, 78 Miss. 401, 29 South. 397. We are not called upon to decide, upon this record, what rights the widow had in this money under the laws of the state of Tennessee, in the event it should develop that John W. Duberry was a resident and citizen of Tennessee at the date of his death.

Not being able, from this imperfect record, to reach any satisfactory conclusion as to the rights of the parties, and as the lower court erred in holding, as it did, that "the paper purporting to be the last will and testament of John W. Duberry is not the will, and does not entitle the defendant to the moneys in controversy," we reverse the case.

Reversed.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

OCTOBER TERM, 1911.

JOHN EATON *v.* ROSCOE BROADBICK.

[57 South. 298.]

1. *WILLS. Construction. Rule of descent. Tenants in common. Improvements.*

Where a testator directed in his will that the cotton on hand be sold as soon as possible and the money turned over to his wife, the proceeds of the cotton were devised to her absolutely.

2. *WILLS. Construction. Rule of descent.*

Personal property not disposed of by the testator's will passes under the statute of descent and distribution to the widow and testator's children and grandchildren according to that statute.

3. WILLS. Construction.

Where by will the testator directed that his land should not be sold until his wife's death, and that then it should be sold, and that notes due him should be collected and the money remain in his wife's hands until her death, such a provision vested a life estate in the widow in the land and in the proceeds of the notes by necessary implication.

4. TENANTS IN COMMON. Improvements.

Where a will provided that no child of the testator should interfere with another's improvements upon the testator's land, and that each child owned the improvements which such child had made and that the land should be divided equally among the children after the death of the widow, the children who take as tenants in common, were entitled to the improvements made severally by them without being charged rent thereon, and if possible have allotted to them the land on which such improvements may have been erected.

APPEAL from the chancery court of Tishomingo county.

HON. J. Q. ROBBINS, Chancellor.

Suit by Roscoe Broaderick against John Eaton et al. for the construction of the will of J. M. Eaton, deceased. From a decree for complainant, defendants appeal.

On June 6, 1896, J. M. Eaton died, leaving as his heirs at law his widow, Emaline Eaton, and his children, John, Tobe, and Wister Eaton, and another son, Bill Eaton, who afterwards died, leaving a wife and children, and Roscoe Broaderick, a grandson, both of whose parents died before the death of J. M. Eaton. Broaderick, who was complainant in the court below, on becoming of age, filed a bill in chancery on the 20th day of March, 1911, making the other heirs parties defendants, asking a construction of the will of J. M. Eaton. Said will is as follows: "My will is that the land remain unsold until after Ma's death and then to sell the land at public auction and noboddy alloud to bid on the land but the children, and one not to bid against another and not bid over one dollar per acre. The notes to be collected and the money to remain in Ma's hands untill her death, the

boys having the authority to collect them. One of the boys to be Rosco's and Wister's guardeen and to see that they have a good horse or mule when they become of age. I want all of the notes turned over to the boys, Tobe, John and Bill, and Ma, and not to tell nobody how much the notes is and who they are on. The cotton on hand to be sold as soon as possible and the money turned over to Ma. No child shall interfere with another's improvements, all of the improvements that he has done is his. I don't want any of my old customers bothered but let them pay as much as they can and make new notes until Ma's death and then the matter must be close up and a final settlement be made. The land to be divided by the tax receipt in equal number of acres and Roscoe to share the same as the rest of the children."

The chancellor gave a written memorandum of his opinion, which is as follows:

"The court is of the opinion, on the hearing of this cause on the petition to construe the will, that some parts of the will are so vague, uncertain, indefinite, and conflicting as to make them void. But there are some provisions that are sufficiently certain and definite, and the will will not therefore be declared as entirely void, but only noneffective as to those provisions that are so unintelligent and inconsistent. The court is of opinion that it is clear that the testator did not desire his land divided until after the death of his widow, whom it is agreed is meant by 'Ma' in the will. It is also clear that he intended the beneficiaries under his will should have the benefit of all improvements such beneficiary or devisee had made or should make on the land occupied by him, and that each devisee should be allotted, as far as practicable in the final division or partition of the land, the land on which he had placed such improvements, and if this could not be done he should be allowed or credited with such improvements. This can be settled in accordance with the desire and will of the

testator in the final settlement of the estate and partition of land, or its proceeds after the death of the widow.

“It is equally clear that the testator did not contemplate a division among the devisees and legatees of the notes due at the time of his death to his estate. He certainly, however, contemplated that the proceeds of such notes should be preserved until after the widow’s death and then divided. It is also clear that he contemplated that each one of his children and Roscoe Broaderick, the sole representative heir and distributee of his sole deceased child, should take an equal value of land and in as nearly as practicable of equal acreage, not counting improvements made by any devisee, and that they should likewise take an equal division of said proceeds of said notes. His method of dividing the land is uncertain, indefinite, and inconsistent, and entirely impracticable, and will have to be disregarded, and the provisions directing the manner of such divisions are void.

“I think the terms of the will give the proceeds of the cotton on hand at his death to his widow absolutely. He makes no definite and certain disposition as to any money or other personal property than the said cotton and, notes, and therefore all such money and personal property would pass under the statute of distribution absolutely to his widow, his children, John Eaton, Tobe Eaton, Wister Eaton, and his grandson, Roscoe Broaderick, each one-seventh, and Mrs. Eleanor Eaton, widow of Bill Eaton, and Bolivar Eaton and Lillian Eaton, only children of Bill Eaton, each one-third of one-seventh.

“No executor is named by the testator to carry out the provisions of his will, and it will be necessary to appoint an administrator *cum testamento annexo*. No intelligible disposition is made of the rents and profits of the land during Mrs. Eaton’s (Ma’s) life, and the land therefore descends to the devisees as tenants in common, and each is entitled to his proper proportion of

such rents and profits from the real estate during the life of his widow. He has, however, provided that the occupants shall have his improvements, and so the tenant in common occupying such should not be charged with rent on his improvements, but should account for reasonable rent of the land, unless all occupy or use practically the same amount. The administrator *cum testamento annexo* will have to collect and apportion the rents. He should also have the custody of the notes due at decedent's death and the proceeds of any that have been collected, and administer under the direction of the court. The proceeds of any money on hand (not loaned out) and the personalty should also be administered by him, and distributed as soon as practicable, as above directed.

“An accounting will be necessary to fix and determine the interest of the parties, and to fix the amounts and disposition made of the personal property, and ascertain the amount of the money and notes, and what of these have been collected, and who is accountable for same; and a master will be appointed to take and state such account. Probably one of the sons may desire to administer. For the present a bond of two thousand dollars is fixed for such administrator. This can be changed on the coming in of the report of the master.”

A decree in accordance with this opinion was entered, and a master appointed to take and state an account, and an appeal granted to either party desiring same.

W. L. Elledge, for appellant.

The decree of the court is that appellee and appellants take the land by devise as tenants in common, subject to the delay until Mrs. Emaline Eaton's death, and that they are liable to each other for rents. Our theory is that under this will Mrs. Emaline Eaton, the widow of the deviser, takes a life estate in the land by implication, and that appellee and the remaining appellants take a remainder under the will as tenants in common.

If our contention is correct, then Mrs. Eaton, the life tenant, is entitled to the rents and is charged with the corresponding duties of a life tenant, and such remainderman as might have occupied portions of the land would be liable to her for rent and not to other remaindermen. It will thus be observed that the determination of the first assignment of error determines the three remaining assignments. If the decree is correct on the first assignment of error it is correct on the other three.

What was the intention of the deviser as he lay on his death bed four days before the dissolution and called his family around him and made this will? They knew nothing of legal phraseology, of estates, of tenures, etc.; they were inexperienced in the art of drafting wills and carving estates and creating tenures. The will itself shows that. Crudely drawn, unintelligible in parts, vague and uncertain in others; but taking those parts that are intelligible and what intention—legal intention—appears? We think that the deviser desired that his family should remain as they were at his death; that his estate should remain intact, the land, and the personal property; that all should remain exactly as it was at that time, the time of making the will (a death-bed will), until when? Until his wife, Mrs. Eamilne Eaton, died. The land should be divided, but not while she lived. The minor son should be raised and also the minor grandson, the appellee, then eight years old; and at her death all should be settled, and the land divided, each child having its own improvements protected in the final division. If such was his intention, the question remains, was it his legal intention, that is, was it put into this will; did he put such an intention into his will? We think he did. What better vehicle of the law could have brought into requisition to accomplish such a purpose than an express life estate with these special privileges to the remaindermen as to their individual improvements?

A life estate is not created expressly, but we contend that there is a life estate by implication. We take it as indisputable that this land was devised to the children and grandchildren, but when should they take? At the death of the devisor or at the death of Mrs. Emaline Eaton? Clearly we think at the death of the latter. If such be the case, he has failed to provide who shall take the land until the death of Mrs. Eaton. The law does not permit a vacuum in title. If the holder of the legal title does not dispose of it at his death then the law undertakes the task of disposing of it for him, the law of descent. The legal title to this land vested somewhere immediately upon the death of Mrs. J. M. Eaton. Where? Upon the children and grandchildren? No, they are postponed until Mrs. Emaline Eaton's death.

Then upon who does this title fall? Who would be the proper party to maintain ejectment? Our answer is, Mrs. Emaline Eaton (ma). She takes a life estate by implication, subject however to the right of the remaindermen to continue their improvements as mentioned in the will. To this proposition we cite the following authorities, to-wit:

Blackstone in his rules for the construction of wills states the proposition as follows: "By a will also an estate may pass by mere implication, without any express words to direct its course. As, where a man devises land to his heir at law, after the death of his wife; here, though no estate be given to the wife in express terms, yet she shall have an estate for life by implication; for the intent of the testator is clearly to postpone the heir till after her death; and if she does not take it, nobody else can." Chase's Blackstone (3d Ed.), p. 506.

The rule is stated and discussed in Jarmin on Wills (3d Ed.), 435-437; also, 1 Washburn on Real Property (2d Ed.), p. 88, sec. 7; *Langrick v. Gospel*, 48 Mich. 185, 12 N. W. 38; *Donohue v. McNichol*, 61 Pa. (11 P. S. Smith) 73; 20 Am. Dig., p. 1397, sec. 615, life estates by implication.

We think from the whole will considered together that the land was devised to the children and grandchildren after the death of the wife, although it does not expressly say so, yet that is the meaning as we view it.

W. C. Sweats, for appellants.

This may seem absurd, but if the court can learn what the testator intended, that intention must stand. It was clearly the intention of the testator that the land remain unsold until after "Ma's" death, and, as we view it, just as clearly implied that "Ma," the widow, should have a life estate therein. It is also clear that the children and Roscoe should have the land in equal parts, or as nearly so as possible, after "Ma's" death. It is also clear that the widow was to retain all the money to be collected until after her death, and that the boys, Tobe, John, and Bill should collect the outstanding notes, and that this money should be turned over to "Ma."

Now we contend that the widow had a right to use that money, or such part thereof as she might need; otherwise, why did he want her to retain the money? What other reason could have had for wanting her to have it except to use it as it might be needed? He also provides that his old customers are not to be bothered until after Ma's death, after which the matter should close up. That provision may seem unreasonable, but it is clearly expressed, and we can see no reason for declaring it void.

W. J. Lamb, for appellee.

The construction that is attempted to be put on this will by counsel for appellants, that the wife had a life estate in this land, is farfetched and is not borne out by the very instrument on which they are trying to stand; and the conduct of Emaline Eaton since the death of J. M. Eaton shows that she did not so interpret the will, nor did she believe that the intention of the de-

ceased was that she should have a life estate, for, as is shown by appellee's bill, and is not disputed or denied, the widow is living on this land and John, Tobe and Wister Eaton are living on this land without any part of it being set apart to them, using it free of charge and rendering no accounting to any one for the use and occupation of the same, and have continued to do so from the time of the death of their father up until the present time. These same parties were in possession of this land at the very time of the making of the will by the deceased and have continued so.

"As the testator has not, by plain words, expressed such intention, we cannot, by construction, import into his will such words as would clearly indicate such intent, for this would be to make a will for him, and not to construe one made by him. The intention of the testator is the polar star for inquiry in the interpretation of his will, but such intention must be collected from the words which he has employed; the question is not what he wished, but what he has said. Broom's Leg. Max. 555." *Johnson v. Delome, etc., Co.*, 77 Miss. 27.

When it comes to disposing of the personal property the will presents greater difficulties, if possible, than it does when disposing of the real estate, and we think that the chancellor gave the appellants everything they were entitled to under this instrument of writing. We do not feel like wearying the court in presenting a matter *ipsa res loquitur*. By merely referring to this instrument of writing and reading it, the court can see as plainly that the opinion of the chancellor is as near correct in this case as anything that can be said if we were to write any number of pages on this matter, so we respectfully refer the court to the chancellor's opinion in this case and the instrument of writing purporting to be the will, and let the court ascertain whether the chancellor was right or wrong in his opinion.

WHITFIELD, C.

This case presents for construction the will of J. M. Eaton. The reporter will set out this will in full.

We concur with the chancellor in so far as he held that the proceeds of the cotton on hand at the death of the testator were bequeathed to the widow absolutely, and also in so far as he held that any money or other personal property than the cotton and the notes passed under the statute of descents and distribution to the widow and his children and grandchildren according to that statute.

We do not concur in his construction as to the title to the land or the proceeds of the notes. We are clearly of the opinion that the will vested a life estate in the widow in the land, and in the proceeds of the notes by necessary implication.

We also concur in the chancellor's holding that the tenants in common who made improvements should keep those improvements, and, if possible, have allotted to them the land on which such improvements may have been erected, without being charged with rent on his improvements. The land will be divided at the death of the mother, the widow, as directed in the will.

Reversed and remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the decree is reversed, and the cause remanded, to be proceeded with in accordance with the foregoing opinion.

ASCHER & BAXTER v. EDWARD MOYSE & Co.

[57 South. 299.]

1. **STATUTES.** *Repeal by implication. Bucket shops. Gaming. Contracts. Public policy. Construction. Appeal and error.*

The repeal of a statute by implication is not favored in the law and where two statutes are seemingly repugnant they must be so construed, if possible, that the latter shall not be a repeal of the former by implication.

2. **SAME.**

Where there is a positive repugnancy between the provisions of the new law and those of the old, then the old law is repealed by implication only, to the extent of the repugnancy.

3. **SAME.**

Where a later act covers the whole subject of earlier acts, and embraces new provisions, and plainly shows that it was intended, not only as a substitute for the earlier acts, but to cover the whole subject then considered by the legislature, and to prescribe the only rules in respect thereto, it operates as a repeal of all former statutes relating to such subject-matter, even if the former acts are not in all respects repugnant to the new act.

4. **SAME.**

The rule that a later act covering the whole subject of a former act and embracing new provisions operates by implication to repeal the prior act is subject to the qualification that where the later act expresses the extent to which it is intended to repeal prior laws, as by a clause repealing all laws in conflict therewith, it excludes any implication of a more extended repeal.

5. **LAWS OF 1908, CHAPTER 118, SECTION 1.** *Bucket shops.*

Section 1 of the Laws of 1908 deals alone with what are known as "bucket shops," and places maintained to receive orders for this class of business, and those persons who are engaged in the management or conducting of this kind of business either as principal or agent.

6. SAME.

Laws of 1908, chapter 118, does not impliedly repeal Code of 1906, sections 1201, 1202, 1203, because the act of 1908 does not deal with the whole subject relating to futures, but prohibits the establishment of "bucket shops" in the state. An action may still be maintained under section 2303 for money lost in future transactions.

7. GAMING CONTRACTS. *Public policy.*

It is the public policy of the state to condemn contracts commonly known as "futures" and a contract for the payment of differences in price arising out of the rise and fall of the market price above or below the contract price is a wager on the future price of a commodity and is invalid.

8. STATUTES. *Construction. Previous acts.*

Courts in construing a statute will presume that the legislature in enacting the statute was familiar with its own enactments and with the construction which the courts had placed on those enactments.

9. CONTRACTS. *Construction. Extra-territorial force. Public policy.*

An act of the legislature has no extra-territorial force, and neither makes unlawful a contract made in another state nor subjects a party thereto to punishment; yet the courts of the state will not enforce contracts made out of this state which are contrary to its public policy.

10. STATUTES. *Construction. Acts 1908, chapter 118, section 2.*

The proviso of section 2 of the acts of 1908, exempting from the condemnation of this act those transactions conducted and carried on through the medium of the mail or telegraph between persons in the state and persons outside of the state, was inserted by the legislature upon the erroneous idea that this provision was necessary to preserve the constitutionality of the act, and it does not render dealings in futures valid when conducted by such persons.

11. SUPREME COURT. *Questions reviewable.*

The supreme court is strictly a court of review and only in rare instances will the court consider, the merits of a controversy, unless passed upon in the lower court.

12. SAME.

Where the lower court erroneously dismissed a bill on the ground that the plaintiff could not sue, the supreme court will not pass upon the merits but remand the cause to the lower court.

APPEAL from the chancery court of Hinds county.

HON. G. G. LYELL, Chancellor.

Suit by Ascher & Baxter against Edward Moyse & Co. et al. From a decree dismissing the bill complainants appeal.

The appellants filed a bill in chancery on January 15, 1910, against the appellees Edward Moyse & Co., cotton brokers in New York City, the State Bank & Trust Company, a banking institution domiciled at Jackson, Miss., and M. A. Lewis, an alleged debtor of said Moyse. The gravamen of the bill is that, beginning on December 31, 1909, the appellants entered into various contracts for the purchase of future cotton from said Moyse; that it was never the intention of either party that actual cotton should be bought, sold, or delivered, but that it was a gambling contract, and was carried on by depositing margins against a decline in the market; that such margins were deposited with the State Bank & Trust Company of Jackson, Miss.; that the money so deposited was kept to the account of Moyse with the said State Bank & Trust Company, to be drawn against by Moyse, who carried out appellants' contracts on the New York Cotton Exchange. The bill further alleges that the appellants had deposited eight thousand dollars with said bank, and had remitted direct six hundred dollars from the time the dealings first began, and suit was brought for these amounts, which, it is claimed, they lost by said speculative future transaction. It is further alleged that six thousand, five hundred dollars of this amount is still in the hands of said bank, which amount the bill seeks to subject to the payment of appellants' claim.

Watkins & Watkins, for appellants, filed an elaborate brief covering all the points decided by the court contending that:

First. Repeals by implication are not favored.

Second. In order that an implied repeal may result the repugnancy appearing in the two statutes must be wholly irreconcilable; and the repugnancy must be clear, convincing, and follow necessarily from the language used. 26 Amer. and Eng. Ency. Law, p. 725.

Third. The repeal in any case will be measured by the extent of the conflict or inconsistency between the acts; and if any part of the earlier act can stand as not superceded or affected by the latter one, it will not be repealed.

Fourth. It is only in rare instances that an affirmative statute repeals a previous affirmative statute, but in such cases it is usually considered that the latter statute is cumulative, rather than exclusive. *Ins. Co. v. Mortimer*, 52 Kan. 784; Lewis and Sutherland on Statutory Construction.

Fifth. While it is ordinarily true that where an act is passed purporting to deal with the entire subject-matter covered by an earlier act or acts, still, if the last enactment contains a provision repealing all acts or parts of acts inconsistent therewith, then the repeal extends only to those acts or parts of such acts clearly inconsistent and irreconcilable with the provisions of the repealing act, and only to the extent of the conflicting provision. 26 Amer. Ency. Law, p. 719, sec. 2303, of the acts of 1908; Section 9 of the acts of 1908; Section 12 of the acts of 1908; *Planters Bank of Mississippi v. State*, 6 Smedes & Marshall, p. 628; *White v. Johnson*, 23 Miss. 68; Section 94 of the acts of 1822; *Shelton v. Baldwin*, 26 Miss. 439; *Richards v. Patterson*, 30 Miss. 583; *Houss v. State*, 41 Miss. 737; *Raymond v. Fisher*, 45 Miss. 151; *Beard v. Leake County*, 51 Miss. 542; *Smith v. City of Vicksburg*, 54 Miss. 615; *Deaton v. Birchard*, 59 Miss. 144; *State v. Henry*, 87 Miss. 125; *Hearn v. Brogan*, 64 Miss. 334; *State v. Waldridge*, 41 Am. St. Rep. 663 (Mo.); *State v. Spencer*, 164 Mo. 48; *State v. Drexel*, 105 N. W. 174; *People v. Huntley*, 71 N. W. 178; .

People v. Van Pelt, 90 N. W. 424; *Express Co. v. City of Lexington*, 83 Ky. 657; *John Conners v. Iron Co.*, 54 Mich. 156; *Holden v. Minnesota*, 34 Law. Ed. 735; *Simmons v. Bradley*, 27 Wis. 769; *Clay v. Allen*, 63 Miss. 426; *Kruse v. Kenneth*, 81 Ill. 199; *Jamison v. Walls*, 167 Ill. 388; *Pierce v. Foote*, 113 Ill. 228; *Exchange v. Mellon*, 27 Ill. App. 556; *Lester v. Buel*, 49 Ohio State 240; *McGraw v. Exchange*, 85 Tenn. 572; *Lemonius v. Mayer*, 71 Miss. 514; *Gray v. Robinson*, 95 Miss. 1; *Virden v. Murphy*, 78 Miss. 515; *Campbell v. Bank*, 74 Miss. 526; *Violet v. Margold*, 27 So. 875; *M. & O. Railroad Company v. Wimer*, 49 Miss. 738; 36 Cyc., p. 1079; *Swann v. Buck*, 40 Miss. 268; *Myers v. Marshall County*, 55 Miss. 347; *White v. Johnson*, 23 Miss. 68; 26 Cyc., p. 1236; *Thompson, Trustee, v. Bank*, 85 Miss. 261; *Railroad Company v. Adams*, 81 Miss. 90; *Edwards v. Lumber Co.*, 92 Miss. 568; *Gray v. Robinson*, 48 So. 226; *Sprague v. Warren*, 3 L. R. A. 679; *Bartlett v. Collins*, 83 Am. St. Rep. 932; *Barnard Backus case*, 52 Wis. 593; *Rogers v. Marriatt*, 59 Neb. 770; *Dows v. Glassbell*, 4 N. D. 261; *Mohr v. Miesen*, 47 Minn. 233; *Waite v. Frank*, 14 S. D. 634; *Edwards v. Hoeffinghoff*, 38 Fed. 639; *Pratt & Company v. Ashmore*, 224 Ill. 587; *Ware Commission Co. v. The People*, 209 Ill. 528; *Williams v. Majors*, 95 C. C. A. 187; *Purvis v. Williams*, 122 N. Y. Sup. 392; *Heard v. Taylor*, 181 N. Y. 233; *Seller v. Leiter*, 189 N. Y. 367; *Christie Grain case*, 198 U. S. 236; *Logan v. Telegraph Co.*, 157 Fed. 582; *Parker v. Moore*, 125 Fed. 807; *Board of Trade v. Kinsey*, 130 Fed. 512; *Cleage v. Ladley*, 149 Fed. 346; *Farnus v. Whitman*, 187 Miss. 381; *Ritcher v. Powe*, 71 Atl. 421; *Ward v. Vossburg*, 31 Fed. 13; *Bangs v. Hornick*, 30 Fed. 97; *Bailey v. Phillips*, 159 Fed. 535; *Richardson v. Shaw*, 52 Law. Ed. 840; *Booth v. Illinois*, 48 Law. Ed. 623; *Parker v. Otis*, 47 Law. Ed. 323; *Lacey v. Palmer*, 31 L. R. A. 822; *State v. Harboune*, 40 L. R. A. 607; *Bryan v. Telegraph Co.*, 157 Fed. 570; *State v. Clayton*, 138 N. C. 737.

Green & Green, for appellees, filed an elaborate brief too long for publication. Citing *Solomon v. Compress Co.*, 69 Miss. 326; *Wilkins v. Riley*, 47 Miss. 306; *Merrill v. Melchoir*, 30 Ib. 516; *Cowan v. Assurance Company*, 73 Miss. 328; *Charles Campbell v. Bank*, 74 Miss. 526; *Isaac v. Silverburg*, 87 Miss. 185; *Hulman v. Johnson*, Cowp. Rep. 343; *Dibbrell v. Danridge*, 51 Miss. 55; *Shattuck v. Miller*, 50 Miss. 386; *Insurance Co. v. State*, 86 Tex. (1893) 265; *Sullivan v. Ammons*, 48 So. 244; *State v. Fragiacomia*, 70 Miss. 802; *State v. Hill*, 70 Miss. 110; *McBride v. State*, 70 Miss. 724; Sedgwick on Stat. and Const. Law 124; *Davies v. Fairbairn*, 3 How. U. S. R. 636; *Dexter and Limerick Plank Road Co. v. Allen*, 16 Bar. 15; *Mobile & Ohio R. R. Co. v. Weiner*, 49 Miss. 725; *Vicksburg v. Insurance Company*, 72 Miss. 70; *French v. State*, 52 Miss. 763; *Laramie County v. Albany County*, 92 U. S. 307; *Board of Supervisors of Sumner County*, 58 Miss. 619; Dill on Mun. Corp., section 126 *et seq.*; *Ellis v. Paige*, 1 Pick. (Mass.) 45; Sedgwick on Stat. Const. 366; *Deaton v. Burchart*, 59 Miss. 144; *Clay County v. Chickasaw County*, 64 Miss. —; *Isaac v. Silverburg*, 87 Miss. 185; *Lienkauf Banking Co. v. Haney*, 93 Miss. 619; *Fellows v. Harris*, 12 Smed. & M., 462; *Hart v. Foundry Co.*, 72 Miss. 809, 17 South. 769; *Zeller v. Leiter*, 189 N. Y. 601; *Zeltner v. Irwin*, 25 N. Y. (App. Div.) 230; *Sondheim v. Gilbert*, 117 Ind. 78; *Gilden v. Blair*, 21 Wall. 241; *Wayne County Savings Bank v. Low*, 81 N. Y. 566; *Hawley v. Bibb*, 69 Ala. 52; *Stix v. Matthews*, 75 Mo. 961; *Swann v. Swann*, 21 Fed. Rep. 299; *Burns v. R. R. Co.*, 113 Ind. 169; *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308; *Hyatt v. Bank*, 8 Bush. 193; *Milliken v. Pratt*, 125 Mass. 374; *Hull v. Spear*, 50 N. H. 253; *Champion v. Wilson*, 64 Ga. 184; *Gaylord v. Duryea*, 69 S. W. 607; *Postal Co. v. Lathrop*, 33 Ill. App. 402; *Berry v. Chase*, 146 Fed. 625; *Bease v. McLean*, 199 Mass. 243; *Sullivan v. Bank*, 70 Pa. 163; *Minzershemer v. Doolittle*, 54 Atl. 611; *Little-*

ton v. Berlin Mills Co., 58 Atl. Rep. 877; *Lescallett v. Commonwealth*, 89 Va. 878; *Scales v. State*, 81 S. W. 949; *Pearce v. Rice*, 142 U. S. 28, 40, 35 L. Ed. 925, 930, 12 Sup. Ct. Rep. 130, 135; *Pickering v. Cease*, 79 Ill. 328, 330; *Cothran v. Ellis*, 125 Ill. 496, 16 N. E. 646; *Richardson v. Shaw*, 209 U. S. 365, 52 L. Ed. 835; *Holcomb v. Kemper*, 214 Ill. 458; *Hallet v. Aggergaard*, 114 N. W. 698; *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159; *Tomblin v. Callen*, 69 Iowa 229, 28 N. W. 573; *Zeller v. Leiter*, 99 N. Y. Sup. 624; *Boyle v. Henning*, 1212 Fed. 367; *Chicago Board of Trade v. Christie G. and S. Co.*, 198 U. S. 249, 49 L. Ed. 1039; *Cleage v. Laidley*, 149 Fed. 351; *Bearse v. McLean*, 199 Mass. 243; *Hooper v. Mickles*, 39 South. Rep. 712; *Farnum v. Whitman*, 187 Mass. 381; *Hacker v. Telegraph Co.*, 34 South. 902; *Ling v. Malcom*, 77 Conn. 517; *Western Union Tel. Co. v. Bradford*, 114 S. W. 686; *Kingsburg v. Kirwan*, 77 N. Y. 612; *Miller v. Klovstad*, 105 N. W. 167; *Ponder v. Jerome Hill Cotton Co.*, 100 Fed. 373, 40 C. C. A. 416; *Clews v. Jamison*, 182 U. S. 461; *Barnes v. Smith*, 159 Mass. 344, 34 N. E. 403; *Board of Trade v. Kinsey*, 130 Fed. 507; *Thompson v. Williamson*, 58 Atl. 605; *Kendall v. Fries*, 58 Atl. 1090; *Hacker v. Western Union Tel. Co.*, 34 South. 902; *Drouilhet v. Pinkard*, 42 S. W. 136; *Boyd v. Hanson*, 41 Fed. 174; *Tel. Co. v. Littlejohn*, 72 Miss. 1025; *Beidler & Robinson v. Coe Commission Co.*, 13 N. D. 645; *Waite v. Frank*, 14 S. D. 633.

Argued orally by *W. H. Watkins*, for appellant, and *Garner W. Green*, for appellee.

MCLEAN, J., delivered the opinion of the court.

Upon the very threshold of the discussion of the questions presented by this record, we express our unbounded appreciation of the exceedingly able arguments, both

oral and printed, made and submitted by counsel for both appellants and appellees. These briefs and arguments have been of inestimable value, not only in diminishing the labors of this court, but in *simplifying* what otherwise might be regarded as a difficult question.

The first question presented is whether chapter 118 of the Laws of 1908 repeals the provisions of the Code of 1906 relative to dealing in futures, and especially whether section 2303 of the Code is repealed. It may be profitable in the first place to refer to what may be regarded as the general rules or canons of construction relating to repeals. The act of 1908 does not contain any express repeal of any former laws, and consequently, if the Code provisions are repealed, they are repealed only by implication. In *McAfee v. Southern Railroad Company*, 36 Miss. 669; *Richards v. Patterson*, 30 Miss. 583, and *Southern Railroad Company v. City of Jackson*, 38 Miss. 334, the rule is laid down by this court that a repeal of a statute by implication is not favored in the law, and that where two statutes are seemingly repugnant they must be so construed, if possible, that the latter shall not be a repeal of the former by implication; and it was further said in *Commercial Bank of Natchez v. Chambers*, 8 Smedes & M. 9, that the two acts, seemingly inconsistent and repugnant, must be so construed, if possible, that both may stand and harmonize. See, also, *Ex parte McClinnis*, 54 South. 260, where the authorities are collected and cited. The leading case in America upon this subject is the case of *Woods v. United States*, 16 Pet. 342, 10 L. Ed. 987, and one which, perhaps, has been followed more than any other authority. In that case the question arose whether the sixty-sixth section of the act of 1799 (Act March 2, 1799, ch. 22, 1 Stat. 677) had been repealed, or whether it remained in full force and effect. That eminent jurist, Mr. Justice Story, speaking for the entire court, says: "That it has not been expressly or by direct terms repealed is admitted;

and the question resolves itself into the more narrow inquiry whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by it; for they may be merely affirmative, or cumulative or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, *pro tanto*, to the extent of the repugnancy."

The rule announced in *Wood v. United States*, *supra*, has been frequently reaffirmed by that court (see *Chew Heong v. United State*, 112 U. S. 549, 5 Sup. Ct. 255, 28 L. Ed. 770; *United States v. Mathews*, 173 U. S. 388, 19 Sup. Ct. 413, 43 L. Ed. 738, and *Red Rock v. Henry*, 106 U. S. 601, 1 Sup. Ct. 434, 27 L. Ed. 251), and generally by the various state courts. See 10 L. Ed. (Extra-Annotated Edition) 183; Note to *Wood v. United States*, 16 Pet. 342-366. Endlich on the Interpretation of Statutes, in considering this question, says, in section 210, that "it is a rule founded in reason, as well as in abundant authority, that, in order to give an act not covering the entire ground of an earlier one, nor clearly intended as a substitute for it, the effect of repealing it, the implication of an intention to repeal must necessarily flow from the language used, disclosing a repugnancy between its provisions and those of the earlier law, so positive as to be irreconcilable by any fair, strict, or liberal construction of it, which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving at the same time, the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject." In 36 Cyc., p. 1073, the rule is thus laid down: "Where two legislative acts are repugnant to, or in conflict with, each other, the one last passed, being the latest expression of the legislative will, must govern,

although it contains no repealing clause. But it is not sufficient to establish such repeal that the subsequent law covers some or even all of the cases provided for by the prior statute, since it may be merely affirmative, or cumulative, or auxiliary. Between the two acts there must be plain, unavoidable, and irreconcilable repugnancy, and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy. If both acts can, by any reasonable construction, be construed together, both will be sustained. Two statutes are not repugnant to each other unless they relate to the same subject. Furthermore, it is necessary to the implication of a repeal that the objects of the two statutes be the same. If they are not, both statutes will stand, although they may refer to the same subject. When two statutes cover, in whole or in part, the same subject-matter, and are not absolutely irreconcilable, no purpose of repeal being clearly shown, the court, if possible, will give effect to both. Where, however, a later act covers the whole subject of earlier acts, and embraces new provisions, and plainly shows that it was intended, not only as a substitute for the earlier acts, but to cover the whole subject then considered by the legislature, and to prescribe the only rules in respect thereto, it operates as a repeal of all former statutes relating to such subject-matter, even if the former acts are not in all respects repugnant to the new act. But in order to effect such repeal by implication it must appear that the subsequent statute covered the whole subject-matter of the former one, and was intended as a substitute for it. If the later statute does not cover the entire field of the first, and fails to embrace within its terms a material portion of the first, it will not repeal so much of the first as is not included within its scope, but the two will be construed together, so far as the first still stands."

If the inquiring mind desires to run out to his satisfaction, and if he will consult the numerous authorities

cited by this author in support of the rule there announced, he will find that the rule is correctly and accurately stated as gleaned and gathered from these various authorities. In the celebrated case of *Great Northern Railroad Company v. United States*, 208 U. S. 452, 28 Sup. Ct. 313, 52 L. Ed. 567, a case of considerable importance, and one in which were engaged some of the brightest legal luminaries in this country, it was in substance announced by that eminent authority that "the rule that a later act covering the whole subject of a former act and embracing new provisions operates by implication to repeal the prior act is subject to the qualification that where the later act expresses the extent to which it is intended to repeal prior laws, as by a clause repealing all laws in conflict therewith, it excludes any implication of a more extended repeal." With these primary, and we may add well-settled, canons of construction before us, it is believed that the solution of the question presented by this record is not a very difficult one. It is contended by learned counsel for the appellees that the act of 1908, not only repealed section 2303, but also sections 1201 and 1202, of the Code of 1906. Section 1201 of the Code condemns any dealing in contracts commonly called "futures," and makes it a misdemeanor so to do, and provides the punishment. Section 1202 condemns the buying or selling of commodities of any kind to be delivered at a future date, without agreeing or intending that the commodities are to be actually delivered in kind and the price paid, and declares the person so dealing to be guilty of a misdemeanor. Section 2303, which is found in the chapter relating to gambling contracts, provides that these future contracts shall not be enforced, and, further, that any person who shall make any such contract, and by reason thereof lose any money or other valuable thing, and shall pay or deliver the same, may, or his wife or children may, sue for and recover such money or other

valuable thing from the person knowingly receiving the same, either for himself or as agent for another.

Turning to chapter 118 of the acts of 1908, we find that the first section of that act deals exclusively with persons, either as principal, agent, broker, or intermediary, who establish, maintain, or operate an office or place of business in this state for the purpose of carrying on or engaging in the business forbidden in the act, commonly called "dealing in futures on margins;" and this section further provides that the person offending any of the provisions of that section is guilty of a misdemeanor, and, on conviction, shall be punished by a fine and imprisonment. This section evidently dealt alone and exclusively with what are known as "bucket shops," and places in this state maintained to receive orders for this class of business, and those persons who were engaged in the management or the conducting of this kind of business, either as principal or agent. Section 3 of said act makes it a misdemeanor for every person who shall become a party to any such contract or agreement as is by this act made unlawful, and every agent or officer of any corporation who shall in any way knowingly aid in making, furthering or effectuating any such contract or agreement, and provides that they shall be punished as provided in section 1 of the act. Section 2 of the act, which is the one especially relied upon by appellees as repealing section 2303 of the Code of 1906, is as follows: "That every contract or agreement, whether in writing or not, whereby any person or corporation shall agree to buy or sell and deliver, or sell with an agreement to deliver, any wheat, cotton, corn or other commodity, stock, bond or other security to any other person or corporation, when in fact it is not in good faith intended by the parties that an actual delivery of the article or thing shall be made, is hereby declared to be unlawful, whether made or to be performed wholly within this state, or partly within and partly

without this state; it being the intent of this act to prohibit any and all contracts or agreements for the purchase or sale of any commodities or thing of value on margin, commonly called 'dealing in futures,' when the intention or understanding of the parties is to receive or pay the difference between the agreed price and the market price at the time of settlement: Provided, that nothing herein contained shall be construed to apply to transaction by mail or wire, between persons in this state and persons outside of this state, where neither person is represented, directly or indirectly, in this state by any broker, agent, attorney or intermediary in said transaction."

This suit was brought by the losers, who were the complainants in the court below. Ascher & Baxter, and therefore the question arises whether the complainants, under the laws of this state (this suit having been instituted on the 15th day of January, 1910, by the complainants filing in the chancery court of Hinds county, in this state, their bill of complaint against Edward Moyse & Co., the appellees), can bring this suit. The right to bring this suit is specifically given to the complainants under section 2303 of the Code of 1906; whereas, under section 9 of the act of 1908, the right to bring an action for a loss sustained in dealing in "future contracts" is given to the parent, wife, child or children, executor or administrator of, or the assignee of, the person sustaining the loss, and further gives the right of recovery in either the circuit or chancery court, and provides that "the sum so lost shall be considered as liquidated damages to the person suing therefor from the broker, agent or intermediary who negotiated such transaction." It is a well-known fact, known to every person in the commercial and business world, that these exchanges where "future contracts" are dealt in, are established and found only in the larger cities of the United States, such, for instance, as in New York, Chi-

cago, and New Orleans. It is further known that the members of these exchanges have in almost every city in the United States agencies, constituting the feeders of these exchanges, where the unwary are induced to engage and to embark in the dangerous, and always risky, business of getting rich quick. It is also a matter well known to every business man in this state that in 1908, and for only a few years prior thereto, we had in this section of the country what was known as these agencies, representing the members of these exchanges and of these bucket shops, and the result was that the spirit of speculation became so rife and so general as to be absolutely demoralizing to the commercial interests of the country. One of the prime evils of latter days is the desire to get rich quick. One of the inherent characteristics of humanity is the spirit of speculation, and every attribute of our nature but swells and exasperates its infernal conflagration. The establishment of these bucket shops and means and methods of communication between the citizens of this state and the various exchanges throughout the country were but kindling wood to set ablaze this spirit of speculation. The evils attending these transactions becoming so numerous and flagrant, it became apparent to the legislature that some specific law should be enacted condemning and prohibiting the establishment and maintenance of these agencies of these exchanges and of these bucket shops; and therefore it was by reason thereof that the act of 1908 was enacted by the legislature of this state.

It has long since been the public policy of the state of Mississippi, not only to condemn contracts commonly known as "future contracts" by the enactment of the various laws specifically condemning these transactions and making it a misdemeanor to so engage therein, but, in addition thereto, as far back as 1892 made the dealing in futures a ground of attachment. The condemnation—indeed, the prohibition—of dealing in futures has be-

come a great public policy in this state. The withering, blighting curse of these speculations has lured the rich and the poor, the princely merchant and the impecunious clerk, the erstwhile honest and trusted employee. The cashiers of many banks, and not a few other fiduciaries, have become obsessed, and have lost honor, reputation, riches, and self-respect beneath its witcheries. The dealing in futures is the begetter of poverty, the companion of embezzlement, the associate of degradation, and it scourges every one whom it touches. Its thirst is unquenchable; its maw insatiable. Its baneful influences have become so destructive to the legitimate business interests of the country, and especially to the cotton planter and to the wheat grower, that for many years there has gone up, and there still continues to go up, a cry to the national congress beseeching that body for the passage of an act prohibiting the making of such contracts and the suppression of the exchanges throughout the states. So far, the "shearers of the lambs, the sellers of doves, and the money changers have desecrated the temple," and the petitions of the people have been cast aside, ungranted. Such is the mischief.

In the Code of 1880, and prior thereto, we had no statutory law specifically condemning by name the making of contracts commonly known as futures. The only statutory law relative to this matter up to that time was the statute against gambling (Code 1880, section 990), and this court, in *Campbell v. National Bank*, 74 Miss. 526, 21 South. 400, 23 South. 25, construed this statute relating to "any wager whatever," and held that dealing in futures was a gamble or a wager, and that a judgment rendered upon a note given to reimburse the payees of the note for money paid on these future dealings was illegal and void, affirming the doctrine announced in *Clay v. Allen*, 63 Miss. 426, to-wit: "Such a proceeding is a wager, and as such void only when the real intent of the parties is to speculate in the rise and fall of prices,

and the goods are not to be delivered, and one party is to pay the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract."

In 1882 the legislature, for the first time, enacted a law (Laws 1882, ch. 117) specially directed against these future contracts, and this act of 1882 first passed under review of this court in *Lemonius v. Mayer*, 71 Miss. 514, 14 South. 33. This court in the last-named case held that the act of 1882, not having been brought forward in the Code of 1892, was thereby repealed. In *Isaacs v. Silverberg*, 87 Miss. 185, 39 South. 420, it was held that under section 2116 of the Code of 1892, which provides that money lost at gambling may be sued for and recovered by the loser, had no relation to contracts for the buying of futures, which are made invalid by section 2117 of the Code of 1892, and which was the law of 1882. This opinion in *Isaacs v. Silverberg*, which was delivered in November, 1905, was evidently a very great surprise to the legislative department of this state, for the reason that it brought forth a vigorous protest from the legislature, which convened only a few months subsequent to the delivery of this opinion, as is evidenced by the enactments of the provisions of the Code of 1906 relating to these transactions. It must be presumed, not only that the legislature was familiar with its own enactments and with the constructions which this court had placed upon those enactments, but also conversant with the rulings of this court; and it is perfectly manifest from the opinions of this court that the well-settled public policy of this state was the condemnation and the prohibition of dealings in contracts commonly called "futures." *Clay v. Allen*, 63 Miss. 426; *Campbell v. National Bank*, 74 Miss. 526, 21 South. 400, 23 South. 25; *Gray v. Robinson*, 95 Miss. 1, 48 South. 226. In the last-named case this court reaffirms the principle announced in *Campbell v. National Bank*, 74 Miss. 526, 21

South. 400, 23 South. 25, to the effect that "a contract for the payment of differences in prices arising out of the rise and fall in the market price above or below the contract prices is a wager on the future price of the commodity, and is therefore invalid." The suit in *Gray v. Robinson*; was upon a promissory note made payable to bearer, and brought by a *bona fide* holder for value without notice, and this court very properly held that the maker was not liable, for the reason that the consideration of the note was given for moneys lost in "future dealings."

In this connection we refer to the opinion of the court in *Campbell v. Bank*, 74 Miss. 530, 23 South. 25, delivered in response to the suggestion of error. It was urged in that case that section 990 of the Code of 1880 was repealed by the act of 1882, in so far as dealings in futures were embraced in that section of the Code. But in response to the suggestion of error this court said that there is not the slightest reference in the act of 1882 to section 990 of that Code, and that repeals by implication are not favored. The repeal by implication, says the court, "must clearly appear in the supposed repealing act, and we fail to find any purpose to repeal any former law by the act of 1882; rather, it appears to have been the intention of the legislature, by enacting the statute of 1882, to enlarge the existing law. The court then says that future contracts are already nonforfeitable under section 990 of the Code, as per the interpretation placed thereon in *Clay v. Allen*, *supra*, and that the second section of the act of 1882, so far as concerns future contracts made in this state, were idle, and added nothing to the law in force, neither did it, as to such contracts, take anything from that law." Section 2 of the act of 1908 provides that "nothing herein contained shall be construed to apply to transactions by mail or wire between persons in and those outside of the state where neither is represented in the state." It there-

fore follows that, if the act of 1908 repeals all former laws upon this subject, we have no law condemning these contracts as specified in the Code of 1906; and, consequently, the courts of this state would be open for the enforcement of these contracts wherever made, provided they were lawful where made. It is true that an act of the legislature can have no extraterritorial force, and therefore can neither make unlawful a contract entered into upon the soil of another state nor subject a party thereto to punishment, yet at the same time, in view of the well-settled public policy of this state, in contemplation of the growing and increasing evils of the traffic, both financial and moral, it is unthinkable to believe that the legislature intended that the courts of this state should be thrown wide open, wherein the contracting parties should be given redress for the enforcement of such contracts when made outside of this state. There surely has been no change in the public policy upon this question, and certainly no developments in recent years which in the least commends this class or kind of dealing to the encouragement of either legislative or judicial bodies.

Under section 9, p. 123, of the acts of 1908, the parent, wife, child, executor, or administrator of the person sustaining a loss, or the assignee of any such person so losing, may recover by suit the amount so lost from the broker, agent, or intermediary who negotiated such transaction. It will be observed that the transaction must have been made in this state, as is provided by this act, and that only the broker, agent, or intermediary is liable for the amount so lost. The principal—the party receiving for himself—is omitted. Under section 2303, the loser, his wife, or child can recover only from the person knowingly receiving the same, either for himself or as agent for another. The fact that the principal is exempted from suit by the latter act is an unanswerable declaration that the purpose was not to

repeal section 2303 of the Code, for by that section he is expressly made liable. No such injustice or absurdity can be attributable to the legislature as to say that it would make the broker, agent, or intermediary liable, and at the same time relieve the principal from liability. The proper construction of the act of 1908 is to say that the legislature did not intend to deal with the whole subject-matter relating to "futures;" but the whole act clearly shows that the purpose was to prohibit the establishment of "bucket shops" and places in this state where these unlawful contracts could be made and entered into. Such being the case, it left in full force and vigor the provisions of section 2303. We therefore say there is no irreconcilable inconsistency between the two statutes. The seeming repugnancy vanishes upon an analytical examination, and the two can stand without eating away or destroying the salutary effect of the other. It is not at all necessary, in order to make these two statutes stand, to obey the positive injunction of the latter act "that it is remedial and should be liberally construed."

We note specially that the act of 1908 provides that "all laws or parts of laws in conflict with this act be and the same are hereby repealed." This is a positive, unequivocal declaration that only such laws as are in conflict with the act are repealed, and is equivalent to saying that all former laws upon the subject must remain unrepealed, unless the latter act is irreconcilable with the former law and comes under the rule announced in *Great Northern R. R. Co. v. United States*, *supra*, that when the latter act covers the whole subject of a former act, and, embracing new provisions, operates by implication to repeal the prior act, is subject to the qualification that, where the latter act expresses the extent to which it is intended to repeal prior laws, it excludes any implication of a more extended repeal. This necessarily must be true when the right to sue is given in the

two acts to a different class of persons. To say that the latter act gives the right to sue to the parent, wife, child, personal representative, or assignee of the person sustaining the loss is not irreconcilable with section 2303 of the Code, giving the right to recover to the loser, his wife or child.

It is urged that the purpose of the legislature was to prohibit the dealings in futures, and that to give the right to the loser to sue for and recover his losses would not tend to the suppression, but rather to the encouragement, of these dealings upon the part of the loser, upon the principle that "heads I win, and tails you lose." This is persuasive; but is not the purpose of the statute made more effective in prohibiting any person from receiving or collecting any money as margins for these transactions with the knowledge that he is liable to be sued for the recovery of the money lost? It is an effort upon the part of the legislature to commercially "leprosize" the gamblers of Mississippi—those who deal in futures.

It also may be insisted that the proviso of section 2 of the act of 1908, exempting from the condemnation of the act those transactions conducted and carried on through the medium of the mail or telegraph between persons in the state and persons outside of this state, was for the protection and in the interest of the local spot cotton buyer, who protects his sales and purchases by transactions upon the future board. We confess that we see very little force in this suggestion. We fail to appreciate the spirit which encourages the doing of an act in one and prohibits it in another class of persons. The purpose was to suppress the traffic as to all persons, to shut out entirely the evil, and the more reasonable construction to place upon this portion of the act is to say that it was inserted by the legislature upon the erroneous idea that the insertion of such a provision was necessary to preserve the constitutionality of the act.

In view of the rulings of the lower court, we cannot consider the merits of this controversy. The lower court declined to enter into a consideration of the merits, but dismissed the bill solely upon the ground that the complainants did not have the right to sue, upon the idea that the provisions of the Code of 1906 were repealed by the act of 1908. This court is strictly a court of review, and it is only in rare instances where the court will consider the merits of any controversy, unless passed upon in the lower court. *Thompson v. Bank*, 85 Miss. 261, 37 South. 645; *Edwards v. Lumber Co.*, 92 Miss. 598, 46 South. 69. A moment's reflection will at once demonstrate the soundness of this rule. The parties to any litigation have the right to have matters of fact submitted to and passed upon by the jury or the chancellor, in whatever forum the cause is being tried, and the finding of facts in the court below by the proper authority will not be disturbed in this court unless it is manifestly wrong. The opportunities afforded to the lower court are so much better for the correct conclusions and findings upon all questions of fact than is this court. Here we have nothing but the naked record before us; there, in most cases, the parties themselves are in the presence of the court and testifying. The manner of testifying, and their appearance upon the witness stand, and many other things, are influential in determining the triers of fact.

Reversed and remanded.

SMITH, J. (dissenting).

I am of the opinion that the act of 1908 "covers the whole subject of the earlier" laws relating to dealing in futures, "embraces new provisions, and plainly shows that it was intended, not only as a substitute for the earlier laws, but to cover the whole subject then considered by the legislature, and to prescribe the only rules in respect thereto," and that, consequently, "it

101 Miss.]

Brief for appellant.

operates as a repeal of all former statutes relating to the subject.”

I feel constrained, therefore, to dissent from the conclusion reached by my brethren.

SAM BYRD v. CITY OF HAZLEHURST.

[57 South. 360.]

CRIMINAL LAW. *Trial. Suspicion. Proof.*

A party cannot be convicted of a crime on suspicion alone, however strong and well founded it may be. There must be proof.

APPEAL from the circuit court of Covich county.

HON. D. M. MILLER, Judge.

Sam Byrd was convicted of unlawful retailing and appeals. The facts are as follows: Two witnesses who testified for the city state that on the night before defendant was arrested they saw him at the train about twelve o'clock; that he left after the train came in and went home with India Robinson who had been off on an excursion and that she brought back two grips and a basket of beer; that defendant took one of these grips with him; that he boarded with India Robinson; that next morning about ten o'clock the officers went to defendant's room to arrest him and make a search for whiskey and found defendant in bed and found eight pints of whiskey in his trunk and several empty bottles in the room; the defendant made no effort to escape or to conceal the whiskey.

W. B. Miller, for appellant.

The defendant assigns as error the action of the court in overruling the motion to exclude the evidence and

dismiss the case when the prosecution rested. This motion should have been sustained and the case dismissed, for clearly the evidence did not sustain the allegations of the affidavit; there was no proof that defendant had ever sold or offered to sell or give away liquor in violation of law. See *State v. Stansberry*, 33 So. Rep. 783; 17 Am. and Eng. Ency. Law (2d Ed.), 374, and citations; *McComb City v. Hill*, decided by this court on the 6th day of November, 1911, No. 15378.

Claude Clayton, assistant attorney-general, for appellee.

There being no contention or controversy as to the facts in this case, I will consider at once the assignment of error. This prosecution is brought under section 1797, Code of 1906. This section of the Code makes it a violation of the law for any person to have in his possession any intoxicating liquors, with the intention, or for the purpose of selling the same, or of giving it away.

I think it incumbent on the state in cases predicated on this section of the Code, to prove to a moral certainty and beyond a reasonable doubt, the intention or the purpose. It is not the possession of the liquor alone that constitutes the offense, but the possession and the intention or the possession with the purpose, of selling it or of giving it away in violation of the law, brings the infraction under the rule of law laid down by this court in the case of *McComb City v. Hill*. I think that the peremptory instruction asked for by appellant should have been sustained.

McLEAN, C.

Sam Byrd was convicted in the city court of Hazlehurst upon an affidavit charging that he "did then and there willfully and unlawfully have in his possession intoxicating liquors, to-wit, whisky, with intention or for the purpose of selling same, in violation of the ordinance

of said city.” Upon this charge he was tried, convicted, and sentenced “to pay a fine of one hundred dollars and all costs of prosecution, and to stand committed until fine and costs are paid.” From this judgment he appealed to the circuit court, and was there convicted, and the court pronounced this judgment: “For such his offense of having whisky for sale he be fined the sum of one hundred dollars and sentenced to the county jail for the period of thirty days, and all costs of this prosecution be taxed, and that he stand committed until said fine and costs are paid.” From this judgment he appeals to this court.

After a thorough consideration of this record, we are convinced that under the facts of this case, and the well-settled rules of criminal law, there is nothing in this record showing that the possession of this liquor by the defendant was with any intent to violate the law as defined by Code of 1906, section 1797, as amended by Laws of 1908, ch. 114. The facts may raise a suspicion; “but the wisdom of the law is such that it refuses to allow any person to be punished for a crime, however strong and well-founded may be the suspicion.” There must be proof. The proof falls far short of showing guilt of defendant. In support of this view we cite the cases of *Stansberry v. State*, 53 South. 783, and *McComb City v. Hill*, 56 South. 346.

In our opinion, the case should be reversed and remanded.

Reversed and remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the judgment is reversed, and the cause remanded.

LEE WILLOUGHBY v. STATE.

[57 South. 361.]

1. PERJURY. *Indictment. Variance.*

An indictment for perjury charging a person with having sworn that "he did not buy certain things" where the evidence shows that the testimony was "that he didn't remember whether he bought or not, that he couldn't recollect," is a fatal variance.

2. SAME.

In order for a conviction to be good in such case the indictment should have alleged substantially what the witness testified to in court, coupled with an averment that in truth and in fact the witness did remember of having bought the thing, that he did recollect of having done so, or words to that effect.

APPEAL from the circuit court of Lincoln county.

HON. D. M. MILLER, Judge.

Lee Willoughby was convicted of perjury and appeals.

The facts are fully stated in the opinion of the court.

A. A. Cohn, for appellant.

The verdict of the jury was unsupported by the evidence. The defendant was indicted for swearing falsely, corruptly, knowingly and feloniously, that he did not purchase beer from Carrie Powell on the 15th day of April, 1910. Every witness introduced by the state swore positively that they were present during the trial of the case of the *City of Brookhaven v. Carrie Powell*, and that they heard the testimony of the appellant Lee Willoughby in that case. Each witness swore that Lee Willoughby did not swear in that case that he did not buy whisky or beer from the said Carrie Powell at said time but on the other hand he did swear that he did not know whether he did or whether he didn't. However,

the stenographer's notes constitute the record and this alone shows what Willoughby swore. In reply to the district attorney's question to state what he knew about Carrie Powell serving beer, appellant replied, "All I know is that I was drunk and they say that I went there and bought some beer." In further reply to the question of the district attorney, "do you say now on your oath that you didn't buy beer from Carrie Powell," appellant replied, "I don't say I did and I don't say I didn't, I don't know what I done." The testimony of appellant that he did not know what he had done on the night of the alleged purchase and that he wouldn't swear whether he had or had not bought whisky from the said Carrie Powell, could not properly support an indictment which charged that he swore on that occasion that he had not bought beer from her at said time. *State of Missouri v. William R. Coyne*, 214 Mo. 344, 144 S. W. 8. This being true that the uncontradicted testimony of the appellant in the circuit court where it is alleged he committed perjury was to the effect that he wouldn't swear that he had bought beer from her but simply that he did not know, how then, in the face of these positive facts, can an indictment and a verdict of guilty thereon be supported by by such evidence. The appellant challenges the record to show one single line of testimony given by the appellant whereon he swore that he did not buy beer from Carrie Powell.

Frank Johnston, assistant attorney-general, for appellee.

I respectfully submit to the court that on the testimony of the case, the charge of perjury is sustained.

It only remains to inquire as to the correctness of the instructions as given by the court. All the instructions asked for the defendant were granted by the court except the tenth, eleventh, and twelfth, which were refused; but the tenth, eleventh and twelfth are fully covered, clearly

and explicitly, by the second, third, fourth, fifth, sixth, seventh, eighth, and ninth charges which were given for the defendant. The jury was fully instructed by these instructions that there must have been a corrupt and wilful false statement by the witness, and that his guilt must be proven to the jury beyond a reasonable doubt. In a word, every point insisted upon by the defendant in his instructions were covered by those instructions which were granted by the court.

Argued orally by *A. A. Cohn*, for appellant.

Argued orally by *Frank Johnston*, assistant attorney-general, for appellee.

McLEAN, J., delivered the opinion of the court.

The appellant was a witness in the prosecution, before the mayor of Brookhaven, of one Carrie Powell for violating the liquor laws. He then and there testified that he had purchased from Carrie Powell two bottles of beer, for which he paid fifty cents. Carrie was convicted. From this conviction she appealed to the circuit court, and upon the trial in that court the appellant was again placed upon the witness stand, and instead of testifying, as he did before the mayor's court, that he bought two bottles of beer, said that "he did not remember whether he bought any beer from Carrie Powell or not; that he could not recollect; that at the time he testified before the mayor against Carrie Powell he was under the influence of whisky and was drunk." Carrie Powell was acquitted because of insufficient evidence; the prosecution relying alone upon the testimony of this young man. After this the grand jury indicted the appellant for perjury. The indictment charged the appellant with having testified before the mayor of Brookhaven that "he, the said Willoughby, had bought intoxicating liquors from the said Carrie Powell on or about the above-mentioned date," and, further, that said Carrie Powell

was convicted before the mayor, from this conviction she appealed to the circuit court, and, when said cause came on to be tried in the circuit court of Lincoln county, "the said Willoughby did then and there appear and tender himself as a witness on behalf of the city of Brookhaven, and was received to give evidence on behalf of the said city of Brookhaven, and did then and there testify," etc., "and thereupon the said Willoughby, desiring and intending to cause and procure a verdict to pass for the said Carrie Powell and acquit her of said charge, changed his testimony from what he had testified to in the mayor's court aforesaid, and then and there, to-wit, before the circuit court, swore and gave evidence as follows: That he, the said Willoughby, did not buy intoxicating liquors from the said Carrie Powell on or about the 16th day of April, 1910, as aforesaid, whereas in truth and in fact he had sworn that she had sold him intoxicating liquors," etc.

The state, in order to support the allegations of the indictment, introduced evidence which clearly supported the allegations of the indictment as to the testimony of Willoughby upon the trial before the mayor of Brookhaven, and the evidence was also clear and positive that the appellant, when testifying before the circuit court, said that "he didn't remember whether he bought any beer from Carrie Powell or not; that he could not recollect—that he might, or he might not." The counsel for the appellant seasonably and timely objected to this evidence, upon the ground that there was a fatal variance between the evidence and the allegation in the indictment. The objections were overruled, and exceptions taken. The court gave for the state the following instruction: "The court instructs the jury, for the state, that if you believe from the evidence in this case beyond a reasonable doubt that Lee Willoughby bought intoxicating liquors from Carrie Powell on or about April 16, 1910, in the city of Brookhaven, and after-

wards appeared in the circuit court as a witness for the city in the trial of the said case of the city of Brookhaven against Carrie Powell on an affidavit charging the said Carrie Powell with the unlawful sale of intoxicating liquors, and knowingly, willfully, falsely, corruptly, and feloniously testified and swore that he did not buy liquors from the said Carrie Powell, in substance and effect, with the felonious and corrupt intent to cause a verdict of not guilty to pass for the said Carrie Powell, then he is guilty and you should so find." This was the only instruction given for the state. The jury returned a verdict of guilty. Thereupon the defendant was sentenced to the penitentiary.

We have carefully searched the books in order to ascertain if any authority could be found to support this conviction. We have failed to find any. The assistant attorney-general, who ably, in both printed and oral argument, represented the state, has failed to find any authority or to show any sufficient reason why the conviction should stand. There is a manifest variance between the allegations in the indictment and the evidence in support thereof. One of the fundamental rules of the criminal law is that the indictment must with sufficient certainty point out to the defendant in a perjury case substantially the words which are alleged to have been spoken. It is not necessary for the evidence to be in the exact words of the language used in the indictment; but the language used in the indictment and that proven upon the trial must be substantially the same. 2 Bishop's New Criminal Procedure, section 916, is as follows: "In stating the substance and effect, reasonable fullness and particularity are required; for, within a distinction already mentioned, they pertain, not to inducement, but to the gist of the offense. It is not adequate to say simply that the defendant swore falsely concerning a thing. The direct meaning of what is said must be given. Nor will any setting out which varies the sense of what was

sworn to be accepted as its substance or effect. Yet a departure in mere form is immaterial." In Chitty's Criminal Law, p. 213, it is said: "These averments or assignments of perjury, as they are technically termed, should be specific and distinct, in order that the defendant may have notice of what he is to come prepared to defend." See, also, Roscoe's Criminal Evidence, p. 684.

It is manifest that an indictment for perjury charging a person with having sworn that "he did not buy certain things," where the evidence shows that the testimony was "that he didn't remember whether he bought or not—that he couldn't recollect," is a fatal variance. In order for the conviction to be good under the facts of this case, the indictment should have alleged substantially what the witness testified to in the circuit court, coupled with an averment that in truth and in fact the witness did remember of having bought beer, that he did recollect of having done so, or words to this effect. *State v. Coyne*, 214 Mo. 344, 114 S. W. 8, 2 L. R. A. (N. S.) 993. *Reversed and remanded.*

HELENA-GLENDALE STEAM FERRY CO. v. STATE.

[57 South. 362.]

INTERSTATE COMMERCE. *Privilege tax.*

A state cannot impose a tax on the privilege of operating a ferry engaged exclusively in carrying passengers across a river from one state to another, as this would be a burden on interstate commerce.

APPEAL from the circuit court of Tunica county.

HON. SAM C. COOK, Judge.

The Helena Glendale Ferry Company was convicted of operating a ferry without paying the privilege tax required by statute and appeals.

The facts are fully stated in the opinion of the court.

W. R. Satterfield and *J. T. Lowe*, for appellants.

Our contention is, that the tax sought to be levied in this case, and collected, and for which the defendants were convicted and fined, was not a tax on the individual owners of the boat, or on the franchise, or on the landing or wharf, but that same was an attempt to tax the business of operating a ferry, which is simply carrying people and freight across the Mississippi river, from Helena, Arkansas, to Glendale, Mississippi, and back. Sustaining us in this contention, we beg to cite the following cases: *Carter v. State*, 60 Miss. 456; *Harness v. Williams, Trustee*, 64 Miss. 600; *Alcorn v. State*, 71 Miss. 464.

And we now submit that the said business of carrying freight and passengers from Helena, Arkansas, to Glendale, Mississippi, and back again, as aforesaid, is commerce between the said states of Arkansas and Mississippi, such as is within the power of congress, exclusively, to regulate. See *Glouster Ferry Co. v. Penn.*, 114 U. S. Rep. 196 (29 L. Ed.), p. 158. Note the language of the court.

“As to the first reason thus expressed, it may be answered that the business of landing and receiving passengers and freight at the wharf, in Philadelphia is a necessary incident to, indeed, is a part of their transportation across the Delaware river, from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation, that is, upon the commerce between two states involved in such transportation.”

Further citing: “The transportation as to passengers is not completed until they are disembarked at the

pier of the city to which they are carried; and, as to freight until it is landed upon such pier, and all restraints by exactions, in form of taxes, upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of congress to regulate that portion of commerce between the states." *St. Clair County case* reported in 192 U. S. Rep. 454; L. C. P. Ed., vol. 48, p. 518; *Covington Bridge case*, U. S. Rep., sec. 154, p. 204; 38 L. Ed., p. 962; *Postal Telegraph Co. v. Wirt Adams*, cited in 71 Miss. 555.

Jas. R. McDowell, assistant attorney-general, for appellee.

I think it beyond dispute that the state would have a right to require a privilege license from the appellant if it stopped at two landings in Mississippi and carried freight and passengers from one point in the state to another and also to points out of the state. Such, however, seems not to be the case. The only business this ferry carries on is the carrying of freight and passengers from Glendale, Mississippi, to Helena, Arkansas. It remains, therefore, to determine whether the collection of a privilege license from the company doing only an interstate business would be an interference with interstate commerce under the Constitution of the United States.

There seems to be two different lines of decisions, and I shall cite the court a few cases and submit the question without argument. *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. Ed. 419; *Maine v. Grand Trunk Railway*, 35 L. Ed. 994; *Gloster Ferry Company v. Pennsylvania*, 114 U. S. 196-218, 29 L. Ed. 158; *Crutcher v. Kentucky*, 35 L. Ed. 649, 47 L. Ed. 419; 10 Am. Dig., p. 791, sec. 119.

Argued orally by *J. F. Lowe*, for appellant.

MAYES, C. J., delivered the opinion of the court.

Section 3814 of the Code of 1906 provides that "each steam ferry operated in the state, in whole or in part, on any stream," shall pay a privilege tax of \$150. The Helena-Glendale Steam Ferry Company is owned by Don G. Owen and H. C. Murnan as partners. The domicile of the partnership, its members, and the ferryboat, is at Helena, Phillips county, Ark. In October, 1910, the owners were indicted in Tunica county, Miss., for exercising the privilege of operating a steam ferry in this state without paying the privilege tax required by the statute above quoted. By agreement a trial was had before the judge, sitting as judge and jury, on an agreed statement of facts, and the court found the defendants guilty and fined them in the sum of seven hundred and fifty dollars and costs, from which conviction an appeal is prosecuted to this court.

In addition to the facts already stated, the agreed facts show that the ferry company at the time of the indictment was engaged in ferrying passengers and freight for hire across the Mississippi river from the city of Helena, Ark., to the landing known as Glendale, in Tunica county. It is further shown that the ferry company owned the land at Glendale, and makes regular trips from Helena to Glendale; that the sole business engaged in by the ferry company consists in ferrying passengers and freight from Helena, Ark., to Glendale, Miss., and back, Glendale being just opposite Helena and directly across the river. The ferryboat never stops at the Mississippi side, except to load and unload freight and passengers. In other words, all the business engaged in by this ferry company is simply to come from the Arkansas side to the Mississippi side, and return from the Mississippi side to the Arkansas side. It makes just this one landing in Mississippi, and is exclusively engaged in ferrying passengers and freight from Missis-

issippi to Arkansas and back. The question is: Has the state of Mississippi the right to levy this tax?

An examination of the case of *Gloucester Ferry Company v. Commonwealth of Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158, seems to settle this question. In that case the United States supreme court expressly holds that a state has no power to levy any tax so as to impose any burden on interstate commerce. The court says: "It matters not that the transportation is made in ferryboats which pass between the states every hour of the day. The means of transportation of passengers and freight between the states does not change the character of the business as one of commerce, nor does the time within which the distance between the states may be traversed. Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of passengers and property and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in congress, is the power to prescribe the rules by which it shall be governed—that is, the conditions upon which it shall be conducted; to determine when it shall be free, and when subject to duties or other exactions. . . . Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and between the states, which consists in the transportation of persons and property between them, is a subject of national character and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation. Its nonaction is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise there would be no protection against conflicting regulations of different states, each legislating in favor of its own citizens and products

against those of other states. It was from apprehension of such conflicting and discriminating state legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the states was vested in congress."

The court further says that if such a tax—speaking of a tax imposed upon the capital of all corporations engaged in foreign or interstate commerce for the use of wharves, etc.—“can be levied at all, its amount will rest in the discretion of the state. It is idle to say that the interests of the state would prevent oppressive taxation. Those engaged in foreign and interstate commerce are not bound to trust to its moderation in that respect. They require security. And they may rely on the power of congress to prevent any interference by the state until the act of commerce—the transportation of passengers and freight—is completed. The only interference of the state with the landing and receiving of passengers and freight which is permissible is confined to such measures as will prevent confusion among the vessels, and collision between them, insure the safety and convenience, and facilitate the discharge or receipt, of their passengers and freight, which falls under the general head of port regulations,” etc.

While it is true that this case is speaking of a tax imposed upon the capital of the corporation engaged in interstate commerce, while the tax under consideration is a mere privilege tax, the principle involved in each case is the same. The court holds that, when one is engaged in interstate commerce exclusively, no burdens can be imposed upon it. The harm resulting to interstate traffic by allowing any state to impose a privilege tax is just the same in effect as if the tax imposed is a property tax. It is imposing a burden by taxation, by whatever name the tax may be called, or by whatever method it may be imposed. A state might impose so great a privilege tax as to prohibit a ferryboat from

landing altogether. So it is said by the court in the above case: "It is idle to say that the interests of the state would prevent such tax, because those engaged in interstate commerce cannot be compelled to trust to its moderation in that respect. They require security. And they may rely on the power of congress to prevent any such oppressive taxation on the part of the state."

In the above case the supreme court of the United States holds that the only burdens which the state may impose upon interstate commerce are those known as "harbor duties or port charges exacted by the state from vessels in its harbors, or from their owners, for other than sanitary purposes are sustained. We say for other than sanitary purposes, for the power to prescribe regulations to protect the health of the community and prevent the spread of disease is incident to all local municipal authority, however much such regulations may interfere with the movements of commerce. But independently of such measures the state may prescribe regulations for the government of vessels whilst in its harbors. It may provide for their anchorage or mooring, so as to prevent confusion and collision. It may designate the wharves at which they shall discharge and receive their passengers and cargoes, and require their removal from the wharves when thus not engaged, so as to make room for other vessels. It may appoint officers to see that the regulations are carried out, and impose penalties for refusing to obey the directions of such officers; and it may impose a tax upon vessels, sufficient to meet the expenses attendant upon the execution of the regulations. The authority for establishing regulations of this character is found in the right and duty of the supreme power of the state to provide for the safety, convenience, and undisturbed enjoyment of property within its limits; and charges incurred in enforcing the regulations may properly be considered as compensation for the facilities furnished to the vessels. Should such

regulations interfere with the exercise of the commercial power of congress, they may at any time be superseded by its action. It was not intended, however, by the grant to congress, to supersede or interfere with the power of the states to establish police regulations for the better protection and enjoyment of property." The supreme court of the United States has been very clear in its rulings upon this subject.

This case is unlike the case of *Pullman Co. v. Adams*, 78 Miss. 814, 30 South. 757, 48 Am. St. Rep. 647. In that case the Pullman Company was engaged in an interstate and an intrastate business, and the tax sought to be collected was on the intrastate business; that is to say, the local business of the Pullman Company. No attempt was made to collect a tax for doing an interstate business, and the court stated, in so far as the interstate business was concerned, that it could conduct it without paying the slightest heed to the act, because it did not apply to or in any degree affect the company in regard to that portion of its business. In the Pullman Company case this court practically held as we now hold, and the case practically concedes that, if there had been any attempt to impose any privilege tax on the interstate business of the company, the act could have had no application, and would have been unconstitutional as an attempt to regulate interstate commerce. In the case of *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965, the supreme court of the United States says: "Again and again has this court affirmed the proposition that no state can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce." See, also, *St. Clair County v. Interstate S. & C. T. Co.*, 192 U. S. 454, 24 Sup. Ct. 300, 48 L. Ed. 518. Of course, this does not interfere with the power of a state to tax the business done wholly within the

state, or to tax instrumentalities used for such commerce; that is to say, commerce which is wholly within the state, as was done in the Adams case.

Our attention is called to the case of *Marshall v. Grimes*, 41 Miss. 27, wherein it is claimed that this court held that the power to establish and regulate ferries belongs to the state, and is not included in the grant of power to the federal government to regulate commerce with foreign nations and among the several different states, etc. The case of *Marshall v. Grimes* involved a different question from the one which is presented in this case. There was no question of taxation, or the imposition of a burden by taxation, involved in that case. What is said in that case as to the power of the states to regulate ferries must be limited to the statement of the rights of the state as contained in the case of Gloucester Ferry Company above referred to; that is to say, to such regulations as will prevent confusion among vessels, and prevent collisions, and such other regulations as may fall under the general head of port regulations, etc. If the case in 41 Miss. 27, does hold, or is intended to hold, that the state has any power to impose any burden by taxation on interstate commerce, it is in direct conflict with the holdings of the United States supreme court on that subject, and to the extent that it so conflicts it must be overruled.

Reversed and remanded.

WILL THOMAS v. STATE.

[57 South. 364.]

1. CRIMINAL LAW. *Judicial notice. Municipal ordinance.*

Courts will not take judicial notice of municipal ordinances. They must be introduced on the trial.

2. MUNICIPAL ORDINANCES. *Appeal to circuit court.*

Where a criminal case is tried in a mayor's court for a violation of a municipal ordinance, it cannot be tried on appeal in the circuit court as a violation of the state law.

3. SAME.

In such case the proper disposition of the case in the supreme court is to reverse the judgment, and remand the case, to be proceeded with as a prosecution by the city.

APPEAL from the circuit court of Hinds county.

HON. W. A. HENRY, Judge.

Will Thomas was convicted of the unlawful sale of liquor in the town of Clinton and appeals.

The facts are fully stated in the opinion of the court.

Lamar F. Easterling, for appellant.

The question to be determined is, was the defendant being prosecuted for a violation of the ordinance of the town of Clinton or for an offense against the state of Mississippi? If this was a prosecution by the town of Clinton for an alleged violation of the ordinances of the town of Clinton, then it was error for the court to overrule the motion in arrest of judgment for there could be no legal conviction for the violation of the town ordinance without proof of the ordinance under which the prosecution was taken. It has been held repeatedly by this court that the court will not take judicial notice of municipal ordinances. *Naul v. McComb City*, 70 Miss.

699, 12 South. 903; *Spears v. Osyka*, 90 Miss. 790; *Allen v. City of Jackson*, 53 South. 498.

If it should be held that the affidavit in question charged a violation of the laws of the state of Mississippi and was a state case, then appellant was not tried for such offense in the mayor's court and the circuit court had no jurisdiction of the case at all, but should have promptly dismissed the case. The circuit court had only such jurisdiction as it acquired on appeal and no other.

Looking at the affidavit in question it will be seen that it is impossible to tell from the affidavit whether this was a prosecution for violation of the state laws or for ordinance of the town of Clinton and on the authority of *Washington v. State*, reported in 93 Miss. 270, it was the duty of the court to have dismissed this proceeding and discharged appellant because the record failed to show what offense was charged and against what power.

Frank Johnston, assistant attorney-general, for appellee.

The style of the case was "*Town of Clinton v. Will Thomas*." An appeal was taken to the circuit court of Hinds county at Jackson. There the case was proceeded with as a state case.

On the trial in the circuit court, the ordinances of the town of Clinton were not introduced in evidence. It appears to have been tried under the general state law. There was a conviction on the appeal in the circuit court.

A motion in arrest of judgment presents the questions for the decision on the present appeal. The mayor of Clinton testified that he tried the case, as mayor, under the ordinances of the town.

The questions for decision here are:

(1) Could there have been a conviction, treating the case as an appeal from the judgment of the mayor's court, without any evidence in the circuit court of the ordinances of the town?

(2) Can the court judicially take notice of municipal ordinances?

(3) Did the circuit court have the authority on the appeal from the mayor's court to convert the case into a prosecution by the state and try the accused for a violation of the general law of the state?

(4) On the failure to introduce the ordinances of the town of Clinton on the trial *de novo* in the circuit court, could there have been a valid conviction of the accused?

WHITFIELD, C.

The affidavit in this case is as follows:

"Before me, the undersigned, mayor of Clinton, and ex officio justice of the peace of said county in the town of Clinton, in justice's district No. 1, said county and state, N. M. McClellon on information makes affidavit that Will Thomas, on or about June 4, 1911, in the county aforesaid, in the justice's district and in the town of Clinton, did willfully and unlawfully sell vinous, malt, spirituous, and intoxicating liquors, against the ordinances of the town of Clinton in such cases made and provided, against the peace and dignity of the state of Mississippi.

"N. M. McCLELLON.

"Sworn to and subscribed before me this 4th day of June, 1911. R. R. Hardy, Mayor & Ex. Off. J. P."

In the mayor's court the appellant was convicted and sentenced to pay a fine of one hundred dollars and to serve thirty days in the town calaboose. On the mayor's docket the case was styled "*The Town of Clinton v. Will Thomas*," and this was shown in the transcript of the proceedings sent up to the circuit court by the mayor. The case was proceeded with in the circuit court as a case against the town of Clinton until the prosecution rested its case. Counsel for the defendant then requested that the court decide whether this was a prosecution by the town of Clinton or by the state of Mis-

Mississippi. The court held that it was a prosecution by the state, and it was so proceeded with to the end. The defendant was convicted in the circuit court, whereupon the defendant filed a motion in arrest of judgment, one of the grounds of which was that the court erred in holding this to be a prosecution of the defendant under the state laws, and the appellant afterwards filed his motion for a new trial.

The ordinances of the town of Clinton were not introduced. This court has several times held that it will not take judicial notice of municipal ordinances. Without the ordinances, therefore, there could have been no conviction in the circuit court, if the prosecution was by the town of Clinton.

It is perfectly evident that the case was proceeded with in the mayor's court as an offense against the town of Clinton, and, if so, manifestly the circuit court had no other jurisdiction than to try it in the circuit court as it had been tried in the mayor's court. We think it is clear from the record that this was a prosecution by the town of Clinton, and the case must necessarily be reversed, for the reasons indicated on the authority of *Washington v. State*, 93 Miss. 270, 46 South. 539.

But we do not concur in the conclusion reached in the case of *Washington v. State*, as to the judgment which should be rendered here. We think the proper disposition of the case is to reverse the judgment and remand the case, to be proceeded with as a prosecution by the town of Clinton.

Reversed and remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the judgment is reversed, and the cause remanded, and the prisoner will be held to answer as for an offense against the town of Clinton; the circuit court amending the affidavit accordingly.

H. C. JOHNSON v. W. J. TABOR.

[57 South. 365.]

1. **STATUTE OF FRAUDS.** *Sale of personalty. Purchase money. Payment. Delivery. Condition precedent. Intention. Writ of inquiry. Damages.*

The term "purchase money" as used in section 4779, Code 1906, means simply the compensation or consideration which the seller is to receive for the property.

2. **SAME.**

Under section 4779, Code 1906, to make a valid sale it is not necessary for the "purchase money" to be paid in coin or currency. It may be paid in anything of value which the parties agree upon and which the seller is willing to receive in payment, and credit given the seller upon his indebtedness, and his actual discharge from any further obligation to pay the same, to the extent of the agreed value of the property, constitutes a payment of the purchase money.

3. **SALE OF PERSONAL PROPERTY.** *Delivery.*

Where a sale of personal property is otherwise complete, delivery as between the parties to the contract is not necessary, in order to invest the purchaser with the title thereto, unless delivery is required by the contract, as a condition precedent to the vesting of the title and the completion of the sale.

4. **SAME.**

Whether or not delivery is a condition precedent to a sale becoming absolute is a matter of intention, and under the evidence in this case it was for the jury to say what was the intention of the parties.

5. **REPLEVIN.** *Assessment of value. Writ of inquiry.*

Where in an action of replevin for two horses the jury which tried the case assessed the value of the two together but not separately and were discharged. It was proper for the court to award a writ of inquiry and submit to another jury the question of their separate values.

6. JUSTICE OF THE PEACE. Jurisdiction. Affidavit.

The test of the jurisdiction of a justice of the peace in an action of replevin is not the value of the property as found by the jury, but the value as alleged in the affidavit, unless the property therein is knowingly over-valued or under-valued for jurisdictional purposes.

7. JUSTICE OF THE PEACE. Jurisdiction. Judgment. Remittitur.

The affidavit on which replevin is begun, before a justice of the peace, is not only the basis for the issuance of the writ, but also the written statement of the plaintiff's cause of action and he cannot recover judgment for a greater value than alleged therein.

8. SAME.

In case the jury award a greater value than claimed in the affidavit in replevin the supreme court will require a remittitur to the amount claimed in the affidavit before affirming the case.

APPEAL from the circuit court of Winston county.

HON. G. A. McLEAN, Judge.

Suit by W. J. Tabor, agent for J. A. Hearon, against H. C. Johnson. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

H. H. Rodgers, for appellants.

It is shown in the evidence that there had never been a sale between Tabor and the appellant for the very simple reason that the trade had never been closed out, for the very next day after Tabor claimed he bought the stock the appellant and W. J. Tabor had a considerable conversation about some cotton, and Tabor mentioned nothing about the stock in any way.

Now the court clearly had no jurisdiction of this case for the simple fact that all the evidence shows that the valuation of the stock placed on it by Mr. W. J. Tabor the appellant was a wilfull under-estimate of the real value of the stock. All the witnesses testified that the valuation of said stock was over two hundred dollars. The two juries who passed upon this case said emphati-

cally in both their verdicts that the value of the stock was more than \$200.

The court erred in sustaining appellees motion for a writ of inquiry when the jury who tried the case originally had returned a verdict in these words and figures to-wit: "We the jury find for the plaintiff and assess the value of the horse at one hundred and fifteen dollars and assess the value of the mare at one hundred and thirty-five dollars."

This was an assessment of the value of the property for more than the jurisdiction of the justice court, hence the circuit court had no more jurisdiction than the justice court appealed from, and it is above the jurisdiction of the inferior and appellate court. *Stephens et al. v. Eiseman*, 54 Miss. 535; *Fenn v. Jane E. Harrington*, 54 Miss. 733.

The court erred in modifying the instruction for the defendant H. C. Johnson. The instruction read before the modification thus: "The court charges the jury for the defendant that the plaintiff must prove clearly and without equivocation that the sale from plaintiff to him was absolute, and if they believe from the evidence that the plaintiff did not rely on the sale and after he had begun this suit he undertook to subject any other property for the credit shown on his books for the two horses in question then they shall find for the defendants."

The court modified this instruction by striking out the latter clause "shall find for the defendant" and added "may consider this fact in connection with all the testimony in determining this case."

In fact the court obviated the entire force of the instruction by the modification for the very reasoning conclusively shows that the plaintiff did not rely upon the sale of the horses from Johnson to him as is shown by his own evidence in which W. J. Tabor states that he undertook to subject one horse for this indebtedness.

The law of the land is, that if Tabor did not rely absolutely upon the sale of the horses from Johnson

to him, then it was not a closed trade, and if he undertook at any time to subject other property to this claim, then he did not rely upon his original agreement of sale with Johnson, and he could not have made Johnson comply with said agreement; but the court said that they might consider that fact. In other words that they could compel Johnson to comply with his contract of sale with Tabor, but from Tabor's own evidence when he did not rely upon the original contract of sale from Johnson, then the jury could consider that fact in connection with all testimony in determining the case.

Flowers, Alexander & Whitfield, for appellant.

The sale, if a sale at all, was purely an executory contract of sale; and when replevin was instituted there had been no delivery. Furthermore there had been no payment of any kind made by anyone to anyone. All that could have taken place, conceding plaintiff's testimony to be true, was merely a conversation relative to a sale.

Such being the case, we ask in all seriousness, how can it be held that there was such sale as the courts of our land will uphold? Because our statute law, Code 1906, section 4779, distinctly says that "a contract for sale of any personal property . . . for the price of fifty dollars or upwards, shall not be allowed to be good unless the buyer shall receive part of the personal property . . . or shall actually pay or secure the purchase money or part thereof, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged by such contract or his agent thereunto lawfully authorized."

Here was a contract of sale, according to plaintiff's contention. It was for personal property. It was for more than fifty dollars, being for one hundred and seventy-five dollars. The animals were not present, and were not then delivered, were in fact never de-

livered. The buyer, Tabor, never received any part of the personal property. He did not pay any purchase money, nor did he secure the payment of the same. A mere notation of credit upon a note is not sufficient. The statute uses the words "actually pay" the purchase money. Further, there was no note or memorandum in writing of the bargain made and signed by the party to be charged therewith. True it is that Tabor says, "I gave him a receipt." He says this twice on the same page. But what kind of receipt was it? What was it for? Who signed it, if any one. It can certainly not be considered as the memorandum or note to be signed by the party to be bound thereby, referred to in the statute, nor is it payment. See *Starling v. Wyatt* (Miss.), 27 South. Rep. 526. Crediting a note upon a creditor's books does not of itself constitute a payment where such note was not given nor received in payment. *Follett v. Steele*, 16 Va. 30, cited on p. 1200 of 30 Cyc.

Nor is showing made that the defendant, Johnson, knew or understood or agreed to such method of alleged payment by the making of a one hundred and seventy-five credit on note of his held by Tabor. Where is there any showing that Johnson actually owed any note to Tabor or to Tabor's agent?

We insist that under Code 1905, section 4779, the contract of sale did not comply with the requirements of law. There was no receiving of any part of the property by the purchaser. There was no actual payment of purchase price. There was no memorandum or note of the sale made by the party to be bound thereby. The authority of Tabor as agent was never shown.

L. H. Hopkins, for appellee.

It will be seen that in the trial upon its merits the original judgment in the court below shows that the jury assessed all of the property as a whole at the sum of two hundred and twenty-five dollars. And the final

judgment in the case is based upon a writ of inquiry for a jury to properly assess the property, that is, to assess each animal separately, as provided for in *Spratley v. Kitchens*, 55 Miss. 578, but the aggregate amount according to their verdict is two hundred and fifty dollars, which of course is above the jurisdiction of a justice of the peace, the case having originated there. But it will be seen from the record that the affidavit, writ, constable's returns and the judgment of the justice of the peace all show the value of the property to be one hundred and seventy-five dollars. And since in *Ball v. Sledge*, 82 Miss. 749, and the authorities cited therein, the affidavit in replevin determines the jurisdiction of the court so far as it concerns the value of the property sued for, unless it is shown that the plaintiff knowingly under-valued or over-valued it for jurisdictional purposes, and since the record only shows conflicting testimony as to the value of the property, and there being no testimony showing that plaintiff knowingly under-valued the property for jurisdictional purposes, as indicated the said *Ball v. Sledge*, 82 Miss. 749, then the affidavit in the pleadings certainly settles the question of jurisdiction, and it reasonably appears that in this case plaintiff should have the property or the value thereof as fixed by the jury.

If it is the law that plaintiff cannot recover for more than the amount of the justice court jurisdiction, then the case should be sent back for the proper judgment in the proper amount, and not subject plaintiff to the disadvantage of another trial of its merits.

Upon a close inspection of the record it will be found that the verdict of the jury settles all questions of fact, and that the court has not otherwise committed any reversible error.

Argued orally by *Chalmers Alexander*, for appellant.

SMITH, J., delivered the opinion of the court.

J. A. Hearon, appellee, was a creditor of appellant, and W. J. Tabor was Hearon's agent, and attended for him to the matters herein involved. This suit, which was begun in the court of a justice of the peace, was instituted by appellee to recover of appellant possession of a horse and mare alleged to have been purchased by him from appellant and paid for by a credit on the debt. The evidence relative to this alleged purchase can best be stated in the language of Tabor, appellee's agent, and is as follows: "On that day he just come to me, and proposed to sell me a horse and mare on that date, and finally we agreed upon it. He wanted me to give two hundred dollars for the mare and horse, on his account—deed in trust, it was—and I told him that I would give him one hundred and seventy-five dollars and after he and I talked awhile over the matter he agreed to take it. He said that he could not pay his debt, and he would save feeding the stock until spring, and he could buy more, and he agreed to take it. I went down to the store, and I gave him credit for the mare and horse, one hundred and seventy-five dollars; also gave him a receipt. He was to deliver the stock to me. He said that he wanted to use the stock a few days—wanted to use the team a few days, and he would deliver me the mare and the horse on the day after Christmas—the Monday after Christmas. That was the understanding between Mr. Johnson and myself about the horse—mare and horse—that he would take one hundred and seventy-five dollars and deliver at the store." All of this was denied by appellant, who claimed that nothing of the kind occurred. From a verdict and judgment in favor of appellee, this appeal is taken.

Appellant, among other things, contends that the alleged sale is void under the statute of frauds (section 4779 of the Code), for the reason that the stock were not delivered and no part of the "purchase money" paid.

It is not necessary for the "purchase money" to be paid in coin or currency. It may be paid in anything of value which the parties agree upon, and which the seller is willing to receive in payment; and, consequently, the credit given appellee upon his indebtedness, his actual discharge from any further obligation to pay the same to the extent of the agreed value of the property, constituted a payment of the purchase money. 20 Cyc. 252. The term "purchase money," as used in this statute, means simply the compensation or consideration which the seller is to receive for the property. *Devin v. Himer*, 29 Iowa, 297.

The stock, however, were never actually delivered; and it is argued that for that reason the sale was incomplete, and that title never vested in appellant. Where a sale of personal property is otherwise complete, delivery as between the parties to the contract is not necessary, in order to invest the purchaser with the title thereto, unless delivery is required by the contract as a condition precedent to the vesting of title and the completion of the sale. *Smith v. Sparkman*, 55 Miss. 652, 30 Am. Rep. 537.

Whether or not delivery is a condition precedent to a sale becoming absolute is a matter of intention, and, under the evidence hereinbefore set out, it was for the jury to say what the intention of the parties hereto was.

The jury which tried the case upon its merits assessed the value of the horse and mare at two hundred and twenty-five dollars, but failed to assess the separate value of each. At a later day of the term the court awarded a writ of inquiry, and the value of the property was by the second jury assessed at two hundred and fifty dollars, the value of the horse being placed at one hundred and fifteen dollars, and that of the mare at one hundred and thirty-five dollars. In awarding this writ of inquiry the court committed no error. The fail-

ure of the jury to assess the separate value of the animals rendered only that portion of the verdict void which assessed the value. Having discharged the first jury without its having properly assessed the value of the property, it became the duty of the court to award a writ of inquiry and to submit that question to another jury. *Spratley v. Kitchens*, 55 Miss. 578.

In order that a justice of the peace may have jurisdiction of a suit in replevin, the value of the property involved must not exceed two hundred dollars. *Biddle v. Paine*, 74 Miss. 494, 21 South. 250. And, since the jury have assessed the value of the stock at two hundred and fifty dollars, it is argued that the justice of the peace, and, consequently, the circuit court on appeal, was without jurisdiction. The test of the jurisdiction is, not the value of the property as found by the jury, but the value as alleged in the affidavit, unless the property therein is knowingly over-valued or under-valued for jurisdictional purposes. *Ball v. Sledge*, 82 Miss. 749, 35 South. 447, 100 Am. St. Rep. 654; *Brumfield v. Hoover*, 90 Miss. 502, 43 South. 951. In the affidavit the value of the property is alleged to be, the horse seventy-five dollars and the mare one hundred dollars, making a total of one hundred and seventy-five dollars, and there is nothing in the evidence to indicate that this allegation was not made in good faith.

The verdict rendered should not have been for more than one hundred and seventy-five dollars the reason that the affidavit in the court of a justice of the peace serves the purpose which the affidavit and the declaration together do in the circuit court; for in the court of the justice of a peace the affidavit serves, not only as the basis for the issuance of the writ, but also as the written statement of the plaintiff's cause of action. *Hawes v. Robinson*, 44 Ark. 308; *Hanner v. Bailey*, 30 Ark. 681. And, consequently, he cannot recover a value greater than that alleged. *Tiedman v. O'Brien*, 36 N. Y. Super. Ct. 539.

As we find no error in the other matters complained of, the judgment of the court below will be affirmed, provided appellee will enter a remittitur of forty dollars on the value of the horse and thirty-five dollars on the value of the mare, making a total of seventy-five dollars; otherwise, it will be reversed and remanded.

Reversed and remanded.

BERK BURKS v. STATE.

[57 South. 367.]

HOMICIDE. Previous difficulty. Threats. Exclusion of evidence.

In a prosecution for homicide where there was a conflict as to how the difficulty began it was error to exclude testimony offered by defendant to show the details of a difficulty between deceased and defendant shortly before the killing and the threats made by the deceased at that time and shortly afterwards against defendant.

APPEAL from the circuit court of Jasper county.

HON. W. H. HUGHES, Judge.

Berk Burks was convicted of murder and appeals.

The facts are fully stated in the opinion of the court.

J. L. Thompson, A. J. Browning and Deavours & Shands, for appellant.

The substance of the rejected testimony so far as this assignment of error is applicable, is that on the morning of the day of the killing, the deceased had drawn a double-barrel shotgun on appellant, and had taken a dime from appellant; and later, in the evening, threatened to kill appellant if he found him. We contend that this testimony was competent.

Remembering that one of the questions involved in the case is whether the deceased made any attempt to attack appellant at the time of the shooting and that the testimony is in conflict as to this matter, we are at a loss to understand on what theory this testimony was held to be incompetent.

That it was competent and ought to have been admitted is, we believe, abundantly supported by the decisions of this court, as well as by the decisions of the courts of other states. In the *Spivey case*, 58 Miss. 959, it appeared that in the forenoon of the day of the killing the deceased had written the defendant a note; that at one o'clock on the day of the killing, the parties had a quarrel and angry words passed between them. Touching this testimony, the court in that case says:

"The note sent by Baily (the deceased) to the accused in the forenoon of the day of the killing had such relation to the subsequent conduct of Baily with respect to the accused as to make it proper evidence. It serves to show the state of Bailey's feelings, and to explain the inquiry which he addressed to the accused near one o'clock that day about not meeting him.

The accused was entitled to exhibit Baily before the jury just as he confronted him when he shot him.

His defense was that he killed Baily because of a reasonable apprehension, excited by the hostile demonstrations of Baily and honestly entertained by the accused, that he was at the time in imminent peril of some great bodily harm then about to be done him by Bailey, to avert which he shot him. The jury was to determine as to the reasonableness as to the apprehension of the accused, situated and circumstanced as he was at the time, knowing what he knew of Baily, and his feelings and disposition toward him, and seeing what he saw at the time in the action of Baily, and interpreting it by the aid of his knowledge of his disposition toward him." *Guice case*, 60 Miss. 714; *Holly case*, 55 Miss. 424.

Shrader's case, 84 Miss. 593; Wharton on Criminal Evidence, secs. 23 and 24; 83 Miss. 645, 85 Miss. 511; 88 Miss 166.

Jack Thompson, assistant attorney-general, for appellee.

It is my view that in dealing with the supreme court, the attorney-general's office should be perfectly frank with the court, and in this case, after a careful and painstaking study of the entire record, I have come to the conclusion that the defendant was deprived of a fair and impartial trial by the learned circuit judge.

There is only one assignment of error upon which I base my decision, and that in the refusal of the lower court to allow the defendant to introduce testimony with reference to separate previous difficulties between the appellant and deceased, all of which occurred within a period of three hours before the tragedy, and grew out of a common cause, and in all of which the deceased was the aggressor. There is a sharp conflict in the evidence as to who was the aggressor at the final culmination of this difficulty, and under these circumstances, it seems to me that under the previous rulings of this court that this testimony was clearly admissible.

In this connection, I cite the court to the cases of *Spivey v. State*, 58 Miss. 959; *Guise v. State*, 60 Miss. 714. In the latter case, the court stated in part:

"It is settled law in this state, that proof such as was here offered is always admissible in evidence, where anything that can fairly be construed as an overt act towards the immediate commission of a dangerous assault can be shown to have been done by the person slain, and that if there be even a doubt as to whether such act was done, evidence such as was here offered should be received. *Holley's case*, 55 Miss. 424; *Kendrick's case*, 54 Miss. 436; *Spring's case*, 58 Miss. 743."

This proposition of law is clearly and concisely set forth in a specially concurring opinion rendered by

Chief Justice Whitfield in the case of *Brown v. State*, 88 Miss. 174, a part of which I cite to the court:

“That where there have been several difficulties between the same parties, growing out of a cause common to them all, so that all the difficulties form one connected and continuous line of hostile conduct on the part of the deceased towards the slayer, such hostility being manifested in every difficulty by the deceased’s having been the aggressor in all such cases, the previous difficulties should be admitted, and their details should be admitted, so far as such details are necessary to explain the motive of the deceased manifested by such continuous line of hostility on the part of the deceased toward the appellant, resulting in the series of difficulties due to the same cause and the fact that in all he was the aggressor, provided, always, that the evidence shall show some overt act on the part of the deceased at the time of the killing against the appellant. The thought and the philosophy of the thing is, that in all cases of that character, each difficulty resulting from the same cause has been inspired by the same motive, shows the deceased to be always the aggressor, and thus presents a continuous system or series of difficulties practically amounting to a continuous assailing of the appellant by the deceased whenever they meet, due to the same motive throughout.”

In view of the conflict of the testimony in this case as to who was the aggressor in this difficulty, frankness compels me to confess to the court, that in my humble opinion this case should be reversed.

SMITH, J., delivered the opinion of the court.

This appeal is from a conviction of the crime of murder. According to the evidence for the state, appellant met the deceased, asked him for his (appellant’s) dime, and, upon deceased declining with an oath to give him his dime, that appellant shot and killed him. The evi-

dence for the appellant tended to show that, when appellant asked deceased for his dime, deceased refused to give it to him, with an oath started toward appellant in a threatening manner, put his hand to his hip pocket as if to draw a weapon, and that thereupon appellant shot and killed him. Appellant offered to prove that earlier in the day deceased, with a shotgun, had forced appellant to give him a dime, which appellant had and which deceased claimed, and that when the gun was taken away from him deceased obtained another gun and came back, threatening to kill appellant, who fled upon learning of his approach; that when he failed to find appellant he threatened to kill other parties if they did not tell him where appellant was, and said, if he saw appellant and Albert Porter "between this and sundown, one or the other of them had to die." This evidence was by the court, over the objection of appellant, excluded. This was fatal error. *Brown v. State*, 88 Miss. 166, 40 South. 737, and authorities there cited.

Reversed and remanded.

W. B. HOOKS v. MRS. E. E. MILLS ET AL.

[57 South. 545.]

1. MASTER AND SERVANT. *Injuries to servant. Contributory negligence. Delegation of duty. Evidence. Instructions. Safe place to work.*

Where there is a material conflict of evidence a peremptory instruction should not be given.

2. MASTER AND SERVANT. *Injuries to servant. Negligence. Question for jury.*

In a suit for the death of a servant while employed as an engineer of a logging train, the questions as to whether the derailment of the train was caused by a defective track, and if so, whether the defect was from the master's negligence were for the jury.

3. MASTER AND SERVANT. *Injury to servant. Delegation of duty.*

Where the defective condition of the track of a dummy line was caused by deceased's own negligence, for the reason that, at his request, he had been given entire supervision of the track and that it thereby became his duty, not only to direct the trackmen where to work but also to inspect their work and see that it was properly done, the master is not liable, even though deceased was not an expert as to the safety of the railroad track.

4. MASTER AND SERVANT. *Injury to servant. Instructions.*

In an action for the death of an engineer employed on a dummy line, an instruction that the fact that the deceased had a right to direct the trackmen where to work would not imply that he had an opportunity to judge of the sufficiency of the work after it was done, should not have been given, because it singled out and gave undue prominence to the fact that deceased's duties as engineer were probably inconsistent with the duty of attending to the repairing of the track, and such an instruction is also improper as a charge on the weight of the evidence.

5. INSTRUCTIONS. *Conformity to evidence.*

In a suit for the death of a servant an instruction "that no proposition or suggestion on the part of the master made to deceased with respect to deceased assuming charge of or responsibility for the maintenance of the roadbed of the railroad, can put that duty upon the deceased unless he did in fact undertake to assume this duty, should not be given where the proposition came from the deceased and not the master.

6. MASTER AND SERVANT. *Injury to servant. Safe place to work.*

A "person operating a railroad" does not owe to his servants the duty "to all times have and maintain a safe roadbed." The duty of the master to furnish the servant with a safe place to work is not absolute, but it is simply to exercise reasonable care to furnish the servant with a reasonably safe place in which to work.

APPEAL from the circuit court of Newton county.

HON. C. L. DOBBS, Judge.

Suit by Mrs. E. E. Mills et al. against W. B. Hooks.

From a judgment for plaintiff, defendant appeals.

This is an appeal from a judgment for appellees, who were plaintiffs in the court below, for five thousand dol-

lars for the death of E. E. Mills; the suit being predicated upon the alleged negligence of the appellant, due to the unsafe condition of a dummy line owned by him and used for bringing logs to his mill. The deceased was engineer on the only engine operated on the dummy line. At his own request he had been given supervision of the roadbed and track. In hauling a train load of logs to the mill, the engine left the track on a downgrade and was upset by the weight of the cars behind it, resulting in the death of Mills. The declaration contains the following allegation: "That the said rails of the said railroad track, at the point where said engine left the said track, were not properly jointed, and the said rails were not bolted on the west side of said track, and secured by a fishplate, and said railroad bed at said point was not provided with a sufficient number of cross-ties with the proper strength, and the ground or earth was not sufficiently tamped around the cross-ties, so as to fasten them securely, and the rails on said railroad bed at said point were not properly in line, and said rails were improperly laid with low centers and high joints at said point."

On appeal, appellant assigns as error the refusal by the court to grant him a peremptory instruction, and the granting of instructions Nos. 3, 6, 9, and 10 for the appellees. These instructions are as follows: No. 3: "The fact that the deceased, Mills had the right to direct the trackmen where to work, would not necessarily imply that he was an expert as to the safety of the railroad track, or that he had any opportunity to judge of the sufficiency of the work after it was done." No. 6: "The court charges the jury, for the plaintiff, that in determining whether or not the deceased, Mr. Mills, had assumed charge of the repairs and maintenance of the railroad track, the jury is to look at all of the testimony, and weigh the same in the light of their everyday experience and common sense, and also in the light

of what the evidence in this case shows the duties of his position as engineer to have been." No. 9: "The court charges the jury that no proposition or suggestion on the part of the defendant made to the deceased, Mills, with respect to his (Mills') assuming charge of or responsibility for the maintenance or repair of the roadbed of the railroad, could put that duty upon the deceased, unless the deceased did in fact undertake to assume those additional duties." No. 10: "The court charges the jury, for the plaintiff, that it is the duty of a person operating a railroad to at all times have and maintain a safe roadbed, and that when the defendant undertakes to show that he escapes this responsibility by pleading that the deceased himself had undertaken to look after the safety of the roadbed that the burden rests upon the defendant to make out that defense by a preponderance of the evidence."

Green & Green, for appellants.

The court erred in not granting the peremptory instruction for the defendant. Proof of an injury is not sufficient to make a defendant liable. The burden, under the law, was upon appellee to show, first, a specific act of negligence, and second, that in pursuance thereof the injury occurred. *Railroad Co. v. Cathey*, 70 Miss. 337; *Patton v. Texas & P. R. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 386; 2 Labatt on Master and Servant, sec. 833; *C. & I. Ry. Co. v. Sparrow*, 98 Va. 630-641, 37 E. 302; *N. W. R. R. Co. v. Cromer's Admx.*, 99 Va. 763-765, 40 S. E. 54; *So. Ry. Co. v. Hall's Admr.*, 102 Va. 135, 45 S. E. 867; *N. & W. Ry. Co. v. Poole's Admr.*, 100 Va. 750, 42 S. E. 882; *N. & W. Ry. Co. v. Cromer's Admx.*, 101 Va. 667, 44 S. E. 898; *Fuller v. Ann Arbor R. Co.*, 104 N. W. (Mich. 1905) 414; *Grant v. Railroad Co.*, 133 N. Y. (1892) 657; *Goronason v. Mfg. Co.*, 186, Mo. 300.

Section 1895 of the Code is not applicable because, in order to raise the *prima facie* presumption, it is re-

quisite that the action be against the railroad company, not against an individual. Therefore, the rule above announced is here applicable and, we respectfully submit, conclusive of this case, for appellant, because nothing is shown in the testimony of appellee which would do more than warrant the wildest conjecture as to what was, in truth and in fact, the cause of this very lamentable accident.

But, independently of this, we submit that Mr. Mills was in charge of the construction and repair of this dummy line, and that it was his duty to keep the same in order. When he was first employed, Mr. Strickland was the foreman of the section gang, but, upon Mr. Stricklands being relieved, Mr. Mills became the only white man who went out after the logs, and thereupon Mr. Mills applied to Mr. Hooks to be put in charge of the entire track, and to have under his direction and control the men employed.

It is further shown that Mills was to have full authority to direct the hands where, when and how to work, and that for the repair of the track he was supplied with all of the requisite material of suitable kind and character.

The third instruction was: The fact that deceased, Mills, had the right to direct the trackman to work would not necessarily imply that he was an expert as to the safety of the railroad track, or that he had any opportunity to judge of the sufficiency of the work after it was done."

This instruction is in violaton of secton 793 of the Code, which provides:

"The judge in any cause, civil or criminal, shall not sum up or comment on the testimony, or charge the jury as to the weight of the evidence; but at the request of either party, he shall instruct the jury upon the principles of law applicable to the case."

The third and fourth instructions were upon the weight of the evidence, and for that reason should not

have been given. The facts therein recited are competent evidence to be considered by the jury in determining whether the sale was made with fraudulent intent, but whether these facts and circumstances, if proved, indicated a fraudulent intent, was a question to be determined by the jury and not by the court. *Jennings v. Thomas*, 13 S. & M. 617; *Fairly v. Fairly*, 38 Miss. 280; *May v. Vaught v. Taylor*, 62 Miss. 500; *French v. Sale*, 63 Miss. 386.

Furthermore in *Kearney v. State*, 68 Miss. 240, Mr. Justice Cooper declared:

“Inference from the facts are to be drawn by the jury unaided and uninfluenced by the court. Our statute means this, or it means nothing. If juries, turning aside from the direction and control of their own judgment, unworthily submit to the impulses of passion, compassion or prejudice, the responsibility is with them, but the court may not, to prevent any such supposed inclination, invade the province of the jury by informing it what weight should or should not be given to establish facts.” *French v. Sale*, 63 Miss. 391. See, also, *Kimbrough v. Ragsdale*, 69 Miss. 677; *Railroad Co. v. Whitehead*, 71 Miss. 451; *Burt v. State*, 72 Miss. 408; *Thompson v. State*, 73 Miss. 584.

It falls squarely within the condemnation of *Minor v. Railroad Company*, 69 Miss. 720. It unduly singles out issues and directs the attention of the jury to those issues, causing the jury to attach to such undue importance. See *Levi v. Holberg*, 71 Miss. 66; *Bryant v. State*, 73 Miss. 838; *Cheatham v. State*, 67 Miss. 635; *Wilson v. State*, 71 Miss. 880.

It is wholly immaterial whether Mills was an expert or not, or whether he had sufficient time to make the inspection or not. The sole question was, had he made an agreement whereunder and whereby such duty of repairing was vested on him; if such was the case, it did not require that he be either an expert, or that he be

allowed to take advantage of his own dereliction in not doing that which he had agreed to do.

Furthermore, it is not permissible for an instruction to assume as a fact as to which the evidence is in conflict. So, when this instruction assumed that "the fact that deceased, Mills, had the right to direct the trackmen where to work," etc., thereunder and thereby appellee committed herself to the declaration that such a fact appeared in the record without controversy.

The ninth instruction was, "The court charges the jury that no proposition or suggestion on the part of the defendant made to the deceased Mills, with respect to his (Mills) assuming charge of or responsibility for the maintenance or repair of the roadbed of the railroad could put that duty upon the deceased unless the deceased did in fact undertake to assume those additional duties."

We submit this is erroneous because not founded on any evidence in the record. It does nowhere appear that Hooks ever made any proposition to Mills with reference to assuming charge of this work, but the evidence all is that Mills made the proposal to Hooks and, as put in the instruction, the testimony is directly reversed.

The tenth instruction was, "The court charges the jury for the plaintiff that it is the duty of a person operating a railroad to at all time have and maintain a safe roadbed, and that when the defendant undertakes to show that he escapes this responsibility by pleading that the deceased himself had undertaken to look after the safety of the roadbed, that the burden rests upon the defendant to make out that defense by a preponderance of the evidence."

We submit that this instruction is erroneous:

(1) That portion of the instruction whereby plaintiff is required to "at all times have and maintain a safe roadbed" is erroneous. It makes an absolute duty of

that for which appellant was under obligation only to exercise reasonable care. In fine, it makes the appellant an insurer, when a master is under no such obligation. Note, especially it applies,

(a) To all times.

(b) That the roadbed be kept safe, absolutely, without qualification or exception. Safety is the requirement, due diligence to that and not the standard.

G. C. Tann and Wm. C. Fitts, for appellees.

The master owes to the train operator the duty of furnishing him a safe track upon which to run, and this is a responsibility of which the master is not relieved by confiding the duty of repair to servants, however competent. Such servants are the master's agents, and their negligence is his negligence. They may be fellow-servants of all others engaged in making the repairs, but not of those for whose use and benefit the repairs are made and the track maintained. This is one duty that the master cannot escape by delegating it. *Balhoff v. Mich. Cent. R. R. Co.*, 106 Mich. 612.

The one to whom this duty is delegated represents the master in that regard, and is not the fellow-servant of an operator who runs upon the track. *Van Dusen v. Letellier*, 78 Mich. 492.

The first and second assignment of error made by the appellant can hardly be taken seriously. They mean the same thing, and seek to assert that the trial court should have taken the case from the jury and decided it. It is certainly not necessary for us to argue that waiving for the present the fact that the plaintiffs below were clearly entitled to a verdict upon the proof of the replication and that all error, even if error had intervened, would be without injury to the defendant below in this condition of the record. Nevertheless, with this thought out of mind for the present, the case at bar may be viewed as a distinctly jury issue; for it is rare

indeed that a negligence case should ever be taken from the jury, and manifestly this is not of the class with respect to which such a course will be for a moment tolerated. So many questions are involved in solution of an inquiry with respect to negligence that it is necessary to examine and consider all of the circumstances going to the solution, and to find, if possible, where the negligence should properly be imputed, all of which is distinctly a question for the jury to answer by its verdict. *Stevens v. Yazoo R. R. Co.*, 81 Miss. 195; *Bell v. Southern Ry. Co.*, 87 Miss. 234; *Allen v. Yazoo R. R. Co.*, 88 Miss. 25; *Romano v. Vicksburg R. R. & Light Co.*, 39 So. 986; *Moore v. M. & O. R. R. Co.*, 24 So. 964; *Gardner v. Smart*, 26 So. 856; *Harris v. Perkins*, 25 So. 154; *Campbell v. Doggett*, 28 So. 371.

When we come to the consideration of the comparatively few instructions given at the instance of the plaintiff below and the very many and favorable instructions which were given in favor of and at the instance of the defendant below, and institute a comparison between them, it will be observed that the jury was fully and fairly instructed as to all of the material issues in the case, and in such way as to be more than favorably impressed with the version and contentions of the defendant. The instructions given in a case must all be construed together, and if as a whole the law was fairly given in the instructions when thus viewed, the verdict should not be vacated because one or more of them when considered alone may be subject to criticism. *Yazoo & R. R. Co. v. Williams*, 87 Miss. 344; *Miss. R. R. Co. v. Hardy*, 88 Miss. 732.

Argued orally by *G. W. Green*, for appellant.

Argued orally by *G. C. Tann*, for appellee.

SMITH, J., delivered the opinion of the court.

Appellant's request for a peremptory instruction was properly refused. It was for the jury to say whether or

not the derailment of the train was caused by a defective track, and, if so, whether or not such defect was the result of appellant's negligence. If the evidence of Mrs. Mills that appellant, in the latter part of November, declined to permit Mr. Mills to assume control of the repairing of the track is true, the jury were warranted in not believing that he had been in such control since August 1st, as claimed by appellant.

Appellee's third instruction ought not to have been given. One of appellant's defenses is that the defective conditions of the track was caused by Mr. Mills' own negligence, for the reason that, at his request, he had been given entire supervision of the track, and that it thereby became his duty, not only "to direct the trackmen where to work," but also to inspect their work and see that it was properly done. If this was Mills' agreement, it was immaterial whether or not "he was an expert as to the safety of the railroad track." There was also no evidence introduced by either party indicating that Mills had no "opportunity to judge of the sufficiency of the work" after it had been done. Even if otherwise proper, this instruction is clearly a charge upon the weight of the evidence.

By the sixth instruction the court singled out and gave undue prominence to the fact that Mills' duties as engineer were probably inconsistent with the duty of attending to the repairing of the track. This ought not to have been done.

The ninth instruction is erroneous, for the reason that the evidence shows that the "proposition or suggestion" that Mills assume "charge of or responsibility for the maintenance or repair of the roadbed" was made by Mills to appellant, and not by appellant to Mills.

A "person operating a railroad" does not owe to his servants the duty "to at all times have and maintain a safe roadbed." The duty of the master to furnish the

servant with a safe place to work is not absolute, but it is simply to exercise reasonable care to furnish the servant with a reasonable safe place in which to work. The tenth instruction was, therefore, erroneous.

The judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

OLLIE WINSTON v. STATE.

[57 South. 545.]

INDICTMENT. *Amendment after proof. Code 1906, section 1508.*

On motion of the district attorney, in order that the indictment might conform to the proof, it was permissible for the court under Code 1906, section 1508, to allow an indictment to be amended by inserting the words "and district" between the words "county" and "aforesaid," making the indictment read "in the county and district aforesaid."

APPEAL from the circuit court of Jones county.

HON. PAUL B. JOHNSON, Judge.

Ollie Winston was convicted of assault and battery with intent and appeals.

The facts are fully stated in the opinion of the court.
R. E. Halsell, for appellant.

We submit that the demurrer charging the indictment failed to show in what district the offense was committed, ought to have been sustained, nor do we think even before trial the indictment was amendable. There should have been another indictment, and certainly the court had no right after the defendant had been tried, to permit the district attorney to amend the indictment as was done in this case.

Frank Johnston, assistant attorney-general, for appellee.

There was a demurrer to the indictment, and pending the demurrer, the district attorney made a motion for leave to amend the declaration by inserting the county, so as to state the venue in the indictment.

The motion to amend followed immediately the demurrer in the record.

It seems that the amendment was made just after the testimony of W. J. Bruce, a witnesses for the state, and the amendment consisted simply in placing the name of the county in the indictment.

The order of the court, allowing the amendment, appears immediately after the indictment and cities that the order allowing the amendment was made on the motion of the district attorney.

In the motion for the new trial, the objection was made to the action of the court in permitting the amendment.

The objection to the amendment is clearly based on a mistaken conception of the law.

Section 1508, of the Code of 1906, provides in the broadest and most liberal manner, for amendments to indictments. This statute has been construed in several cases by this honorable court in which the court has allowed amendments to be made in indictments, which are clearly authority for the amendment made in this case.

In *Haywood's case*, 47 Miss., a name was changed in the indictment, and so in *Foster's case*, 52 Miss., and *Knight's case*, 64 Miss.

Section 1508, of the Code, expressly provides that the name of the county in the indictment may be changed, or added, by the amendment.

The matter of an amendment of this character is clearly technical and formal, but the place of the crime is not in dispute.

It is not shown by the record that the appellant was taken by surprise by the amendment or that his case was in any manner, prejudiced by the action of the court in this respect.

SMITH, J., delivered the opinion of the court.

Appellant was indicted and convicted in the second district of Jones county for assault and battery with intent, etc. In the body of the indictment the venue was laid "in the county aforesaid." On motion of the district attorney, and in order that the indictment might conform to the proof, the court permitted the indictment to be amended by the insertion of the words "and district" between the words "county" and "aforesaid," making the indictment read "in the county and district aforesaid." This amendment was authorized under section 1508 of the Code, which permits amendments to conform to the proof to be made in the name of any county, city, town, village, division, or any other place mentioned in such indictment.

The court committed no error in reference to the other matters complained of.

Affirmed.

MAHLEY DISMUKES v. TOWN OF LOUISVILLE.

[57 South. 547.]

1. MUNICIPALITIES. *Ordinances.* Code 1906, section 3410, chapter 28.

An ordinance of a town which provides "that chapter 28 of the annotated Code of Mississippi be and the same is hereby adopted as the criminal Code and laws of the town" is void, in that it attempts to confer upon the mayor of the town jurisdiction over all felonies as well as misdemeanors committed within the corporate limits.

2. SAME.

Code 1906, section 3410, giving all the authority granted in the premises, expressly limits the power to misdemeanors.

APPEAL from the circuit court of Winston county.

HON. G. A. McLEAN, Judge.

Mahaley Dismukes was convicted of selling intoxicating liquors in violation of an ordinance of the town of Louisville and appeals.

The facts are fully stated in the opinion of the court.
Z. A. Brantley, for appellant.

The appellant was indicted in the mayor's court of the town of Louisville, Mississippi, for selling whiskey in less quantity than one gallon and convicted. She appealed to the circuit court and was there convicted.

The appellant was tried under an ordinance purporting to be a general ordinance against crimes and misdemeanors of the town of Louisville. According to the record in the case the ordinance was not identified as the ordinance of the town of Louisville. It also fails in that it was not alphabetically indexed as required by law; and the ordinance also fails to cite the book and page of the minutes containing the record of its passage as peremptorily required by law.

We call the court's attention specially to section 3407, Code 1906, in which it states, "that the town clerk shall cite therein the book and page of the minutes containing the record of its passage." He shall also keep said book accurately indexed alphabetically. By referring to the ordinance in the record the court will readily see that none of the above requirements have been complied with by the town clerk, and since this is mandatory the ordinance is null and void and without effect.

Claude Clayton, assistant attorney-general, for appellee.

As a matter of candor and frankness to this court, I desire to say that the fatal error, and the only one that I conceive to have been made in the trial of this case, was the ordinance itself. But this point is not raised by counsel for appellant, and is clearly decided in the case of *Town of Oakland v. John Miller*, 90 Miss. 275, which holds that the adoption of an ordinance by a municipality making all crimes and misdemeanors of the state, violations against the municipality, absolutely void, in that it gives to the municipality, or attempts to give, the right to try felonies.

McLEAN, C.

Affidavit was made before the mayor of the town of Louisville, against appellant, charging her with the unlawful selling of intoxicating, etc., liquors. She was convicted and sentenced by the mayor. From this judgment she appealed to the circuit court. There she was again convicted, and was sentenced by the court. From that judgment she appeals to this court.

The alleged ordinance under which she was tried is set out in the record and reads as follows: "Section 1. Be it enacted by board of mayor and aldermen of the town of Louisville, Miss., that chapter 28 of the Annotated Code of Mississippi be and the same is here-

by adopted as the Criminal Code and laws of said town.” Code 1906, section 3410, provides that “all offenses under the penal laws of the state amounting to a misdemeanor shall, when so provided by a general ordinance of the municipality, also be offenses against the city, town or village in whose corporate limits the offense may have been committed to the same effect as though such offenses were made offenses against the city, town or village by separate ordinance in each case, and upon conviction thereof the same punishment shall be imposed by the city, town or village as is provided by the laws of the state with regard to such offenses against the state not in excess of the maximum penalty which may be imposed by municipal corporations.”

By an inspection of this town ordinance, it is clear that it includes all felonies, as well as misdemeanors; but it is manifest that section 3410, Code 1906, carefully limits the jurisdiction of villages, towns, etc., to misdemeanors. But this town ordinance “sweepingly provides that not only misdemeanors, but that all felonies against the state, shall be dealt with by the mayor of the town as if he had full jurisdiction.” This ordinance is “absolutely null and void, because it attempts to clothe the mayor (of Louisville) with jurisdiction over felonies, as well as misdemeanors.” In support of this position, we cite the well-considered opinion of this court in the case of *Town of Oakland v. Miller*, 90 Miss. 277, 43 South. 467.

We think the case should be reversed and remanded.

Reversed and remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the judgment is reversed, and the cause remanded.

ROSA MINOR v. STATE.

[57 South. 548.]

CRIMINAL LAW. Trial. Argument of counsel.

In a trial for murder where the district attorney was permitted over the objection of defendant to say to the jury, "If you bring in a verdict of manslaughter, the court does not have to sentence defendant to the penitentiary, but can fine her or send her to the county farm," it was reversible error.

APPEAL from the circuit court of Warren county.

HON. H. C. MOUNGER, Judge.

Rosa Minor was convicted of manslaughter and appeals.

The facts are sufficiently stated in the opinion of the court.

Jas. R. McDowell, assistant attorney-general, for appellee.

In the closing argument, the district attorney used the following language:

"If you bring a verdict of manslaughter, the court does not have to sentence her to the penitentiary, but can fine her or send her to the county farm."

A special bill of exceptions was taken to this language and it is assigned as error in this court.

Our court has held that language similar to this constitutes reversible error. *Windham v. State*, 91 Miss. 845. If the *Windham* case is to be followed, the case at bar must be reversed.

SMITH, J., delivered the opinion of the court.

Appellant was indicted for murder, and convicted of manslaughter. The district attorney in his closing argument used the following language: "If you bring

in a verdict of manslaughter, the court does not have to sentence her to the penitentiary, but can fine her or send her to the county farm." Appellant's objection to this language was overruled, and an exception taken.

This language is practically the same as that used by the district attorney in *Windham v. State*, 91 Miss. 845, 45 South. 861, and consequently the judgment of the court below must be reversed, and the cause remanded.

Reversed and remanded.

BOB FLOWERS v. STATE.

[57 South. 226.]

1. CRIMINAL LAW. *Instructions. Harmless error.*

Where accused was indicted for an assault and battery with intent to kill and murder and the evidence only showed an *assault* with intent to kill, it was harmless error for the court to instruct the jury that if they believed from the evidence beyond all reasonable doubt that defendant was guilty of assault with intent to kill and murder they should find him guilty as charged in the indictment, as under an indictment for an assault and battery with intent to kill and murder a conviction can be had for assault with intent to kill and murder.

2. SAME.

The crimes of assault and assault and battery with intent to kill and murder, are merely statutory forms of attempt to commit murder, are both created by the same statute and the punishment for each is the same.

3. HARMLESS ERROR.

A conviction will not be reversed for an error not prejudicial to the party complaining.

APPEAL from the circuit court of Warren county.
HON. H. C. MOUNGER, Judge.

Bob Flowers was convicted of an assault and battery with intent to kill and murder and appeals.

The facts are fully stated in the opinion of the court. .
No brief of counsel in the record.

SMITH, J., delivered the opinion of the court.

Appellant was indicted and convicted for an assault and battery with intent to kill and murder Ellen Carroll. The proof showed that he shot at Ellen, but failed to hit her, and that, consequently, he was guilty of an assault with intent to kill and murder, and not of an assault and battery with intent to kill and murder. The error complained of is that the court, in effect, charged the jury, for the state, that if they believed from the evidence; beyond a reasonable doubt, that appellant was guilty of assault with intent to kill and murder, they should find him guilty as charged in the indictment, thus convicting him of the battery, as well as of the assault. In so far as this instruction charged the jury to find appellant guilty as charged in the indictment, it was erroneous; but this error was perfectly harmless, and could not have prejudiced appellant. It requires no citation of authority to support the statement that, under an indictment for an assault and battery with intent to kill and murder, a conviction can be had for assault with intent to kill and murder. The latter crime is necessarily included within the former. This being true, had the court concluded its charge with a direction to find appellant guilty of an assault with intent to kill and murder, and the jury had so found, both the charge and verdict would have been correct. The crimes of assault, and assault and battery with intent to kill and murder, are mere statutory forms of attempt to commit murder, are both created by the same statute, and the punishment for each is the same. The jury, by their verdict under the instruction complained of, necessarily found the existence of facts which show that appellant was

guilty of an assault with intent to kill and murder. While the verdict returned was for assault and battery with intent to kill and murder, the punishment imposed upon appellant was the same as would have been imposed upon him had the verdict been for assault with intent to kill and murder, the crime for which he was, in fact, convicted.

It follows, therefore, that the error complained of was harmless, and this court has "full many a time and oft" held that it would not reverse a judgment for an error not prejudicial to the party complaining. The case of *Montgomery v. State*, 85 Miss. 330, 37 So. 835, in which the court's attention seems not to have been directed to the fact that the error was harmless, in so far as it conflicts herewith, is overruled.

Affirmed.

J. W. PERSONS v. JOHN F. OLDFIELD.

[57 South. 417.]

1. PARTNERSHIP. *Agency. Liability. Foreign judgments. Commercial paper.*

The authority of one partner to bind his copartner is placed solely upon the ground of agency and one partner can bind the other only within the scope of his agency.

2. PARTNERSHIP. *Commercial paper. Burden of proof.*

While it is true that when the firm's name is found upon commercial paper, *prima facie* the firm is bound, yet this casts upon the party attempting to escape liability only the burden of showing that the party signing the name of the firm had no power to do so.

3. PARTNERSHIP. *Unauthorized act of partner.*

Where a partner without authority from his co-partner signs the partnership name as surety for another, the co-partner having

received no benefit from the transaction, and it being foreign to the firm's business, the co-partner is not bound, even though the obligee was ignorant of the partner's want of authority.

4. PARTNERSHIP. *Foreign judgment. Effect.*

A judgment recovered in another state against a partnership only binds the individual member of the firm upon whom process is served and the partnership property of the firm in the other state.

APPEAL from the chancery court of Hinds county.

HON. G. G. LYELL, Chancellor.

Suit by John F. Oldfield against J. W. Persons. From a decree for complainant, defendant appeals.

The appellant, who is a resident of Jackson, Hinds county, Miss., was engaged as a partner in the lumber business with Charles C. Ruggles; the domicile of the partnership being at Mobile, Ala., and the style of the firm being Charles C. Ruggles & Co. Oldfield, a resident of Baltimore, Md., having an order from Adams Bros., a firm in Rankin county, Miss., for certain material, amounting to five hundred dollars, was referred by Adams to Charles C. Ruggles & Co. Oldfield then wrote to Chas. C. Ruggles & Co., at Mobile, to know if that company would assume responsibility for the payment in cash of one-half of the account of Adams Bros. to Oldfield, and if Chas. C. Ruggles & Co. would indorse Adams Bros.' note for the balance. Persons knew nothing of this transaction; but Ruggles, acting without authority from Persons, wrote to Oldfield as follows." "We assume responsibility of the two hundred and fifty dollars cash payment written you by Adams Bros., of Rankin county, Miss., and in accordance with the terms as outlined in your letter." Adams Bros. became insolvent and did not make a cash payment. Oldfield presented the Adams notes for the deferred payments to Chas. C. Ruggles, and demanded that they be signed and the cash payment of two hundred and fifty dollars be made. Both demands were refused. These

facts were embodied in a bill in chancery. Persons, answering, denied knowledge of the transaction, also denying authority of his partner to act for the partnership and bind it for the debts of Adams as being an act beyond the scope of the partnership business. The bill of the complainant also set up the fact that a judgment had been obtained in Mobile county, Ala., against both Ruggles and Persons; but it was shown that service had never been obtained on Persons. There was a decree for the complainant against Persons for the whole amount, from which comes this appeal.

Flowers, Alexander & Whitfield, for appellant.

We contend as follows:

1. The Mobile judgment in nowise made Persons responsible or liable.

2. Under the facts (looking into the merits) the action of the one partner, Ruggles, in attempting to make the partnership a surety or guarantor of Adams Bros.' debt, was an act without the scope of the partnership business.

Discussing the foregoing seriatim:

The Mobile judgment in no wise made Persons liable to the appellee, Oldfield. The court must look at the abstract of proceedings in the Alabama court, which are a part of this record. We find that Oldfield, in the Alabama court, instituted suit at Mobile. But against whom. Against "Charles C. Ruggles & Co. composed of Charles C. Ruggles." We quote this from the declaration in such Alabama court, page 17 of the record. The declaration there refers to "the defendant," and not to defendants. The judgment of the Alabama court speaks of "the defendant (singular form). All this time Persons was in Mississippi. He absolutely did not know of the proceedings. Ruggles lived in Mobile, and Ruggles accepted service. Ruggles in fact was a bad egg all around. The acceptance of service could bind

only the partner, Ruggles, and the assets of the partnership, and could not bind Persons so as to make Persons personally responsible for the Alabama judgment. Hence the chancellor of the court below was correct when he sustained our first demurrer to the chancery bill of Oldfield, thereby in effect holding that as to any issue based on the default Alabama judgment Persons could not be held personally liable on that alone. We see no necessity for citing authorities as to this.

As to our second contention. We say that the acts of Ruggles (the other partner), were without the scope of the partnership, hence Persons cannot be held liable to Oldfield.

We insist that *Silverstein v. Atkinson*, 45 Miss. 81, applies. It says that a member of a commercial partnership cannot use the firm name as surety for third persons, and make the other partner liable. And see *Pickels v. McPherson*, 59 Miss. 216. And see generally decisions, pp. 901, 902, B. & A. digest.

J. H. Thompson for appellee.

Counsel for appellant seemingly confuses the character of evidence with the question of substantive rights. Had the firm of Charles C. Ruggles & Company paid Oldfield five hundred dollars in cash for the outfit and turned it over to Adams Brothers as an advance payment for the output of Adams Brothers mill, it could not be claimed that this was without the scope of the partnership business. Ruggles had a perfect right to pay for lumber with property as well as with money. He had a perfect right to pay cash. Assuming that this statement is correct, did not the right to pay in cash carry with it the right to pay in installments evidenced by notes of the parties so desired? Counsel for appellee practically admits that the judgment should be affirmed as to the two hundred and fifty dollars, cash payment contemplated but, because the deferred payments were

to be evidenced by endorsed notes, counsel for appellee conceives that this whole transaction is based on an accommodation endorsement and has treated the evidence of the deferred payments as changing the legal status of the whole transaction.

The court will note that the transaction involved in no sense an accommodation endorsement. The firm of Charles C. Ruggles & Co., managed by Charles C. Ruggles, with the consent of the other partner and permitted to carry on the business free of restrictions, undertook to secure the lumber to be manufactured by Adams Bros. and, instead of paying them money in advance for the lumber, it enabled them to obtain the drying outfit from Mr. Oldfield by agreeing to pay Oldfield, and Oldfield parted with his property wholly and solely because of the agreement entered into by the firm of Charles C. Ruggles & Co. No benefit was contemplated except to the partnership, a trading partnership—which had the right to draw and accept bills of exchange in relation to and in furtherance of the partnership business; and the formation of the partnership, and its existence, carries with it the communication of power to each member to transact the business of the firm and bind each partner accordingly.

The syllabus in the case of *Bloom v. Helm*, 53 Miss. 21, it is submitted, correctly announces the law. The syllabus is as follows:

“An accommodation acceptance by one member of a firm in the partnership name, without the authority or consent of his co-partner, is not binding on the latter, in the hands of a holder, who took it with notice that it was purely an accommodation acceptance, and not given in furtherance of the business of the firm, but for the private use of a stranger, the drawer of the bill.”

The court will observe that the bill sets out the merits of the transaction, as well as the rendition of a judgment in the State of Alabama, and embraced what may

be called two separate counts. The learned chancellor who decided this case stated that he thought complainant entitled to a decree on the merits and he did not pass upon the question of *res adjudicata*. While it seems clear that the cause should be affirmed on the merits, still it may not be amiss to call the attention of this court to the laws of Alabama with reference to suits against partnerships. Section 2506 of the Code of Alabama of 1907 (which is a re-enactment of former statutes) is in the following words:

“Suits against partnership by firm name or against one partner.—Two or more persons associated together as partners in any business or pursuit, who transact business under a common name, whether it comprise the names of such persons or not, may be sued by their common name, and the summons in such case being served on one or more of the associates, the judgment in the action binds the joint property of all the associates in the same manner as if all had been named defendants, and been sued upon their joint liability, and served with process; any one or more of the associates, or his legal representative, may also be sued for the obligation of all.”

The case of *Bowin v. Sutherlin*, 4 Ala. 278, holds: “Acceptance of a summons and complaint by one partner in the name of the partnership is equivalent to service on all in respect to their joint property.”

McLEAN, J., delivered the opinion of the court.

The authority of one partner to bind his copartner is placed solely upon the ground of agency, and hence one can bind the other only within the scope of the agency. A partnership is organized to conduct the business for the benefit of its members, and it is foreign to its business to become surety for the members of the firm (unless this is the business in which the firm is engaged), or responsible for the debts of the individual

members of the firm. This is elementary. It is doubtless true that, when the firm's name is found upon commercial paper, *prima facie* the firm is bound. *Faler v. Jordan*, 44 Miss. 288. But this casts upon the party attempting to escape liability only the burden of showing that the party signing the name of the firm had no power so to do.

It was held at an early date in this state that where one of two persons subscribes the partnership name to a note as surety for a third person, without the authority or consent of the other partner, the latter is not bound, and it lies upon the plaintiff to prove the authority or consent of the other partner. *Andrews v. Planters' Bank*, 7 Smedes & M. 192, 45 Am. Dec. 300. And the rule has never been departed from. *Bloom v. Helm*, 53 Miss. 21. The same is true in Alabama, wherein it is held that one partner cannot bind his copartner by signing their names as sureties in a note, nor can he draw, indorse, guarantee, or accept in the firm name a note or bill of exchange for the benefit of a third person; and where it appears that he has thus used the partnership name, it devolves upon the party who seeks to enforce such a security to show that the transaction was sanctioned by the inactive partner. *Lang v. Waring*, 17 Ala. 145. And it may be said that this is the law in all other states.

The suit in this case is not upon a piece of commercial paper; but the defendant is sought to be bound upon a letter, written by Ruggles on behalf of Ruggles & Co., of Mobile, Ala.; and the correspondence shows that Ruggles & Co., became the mere surety of Adams Bros., without the knowledge or consent of Persons. Therefore, *prima facie*, the nonconsenting partner is not liable. It is sought to evade this by showing, first, that Oldfield was ignorant of the want of authority upon the part of Ruggles & Co., to bind the absent partner; and, second, that there was a consideration moving between Adams

Bros. and Ruggles & Co., whereby the latter agreed to guarantee the payment of the debt.

There are two answers to the first contention, to-wit: It was Oldfield's duty to ascertain whether Ruggles & Co. had the authority to bind the individual members of the firm; and, second, Oldfield's good faith cannot supply the want of power of Ruggles & Co. to bind Persons.

As to the second proposition, it is sufficient to say that counsel have not cited us to, and we have been unable to find, any authority which holds that it is sufficient to bind the nonconsenting member of a partnership to show that the partnership, in consideration of becoming surety, expected to reap some benefit from the transaction. It is unnecessary for us to go to the length this court went in *Pickels v. McPherson*, 59 Miss. 216, to show that appellant is not liable. The partnership of Ruggles & Co. received no benefit whatever from this transaction, and becoming the surety of Adams Bros. was entirely foreign to the business in which Ruggles & Co. were engaged, and beyond the scope of the authority of Ruggles, either real or apparent, to bind the nonconsenting member of the firm.

We do not consider it at all material to decide whether the contract in this case is to be governed by the laws of this state or of Alabama, as the law of both jurisdictions is the same.

It is manifest that the judgment recovered in Alabama against Ruggles & Co. only bound the individual member of the firm upon whom service of process was had and the partnership property of the firm in Alabama.

Reversed and remanded.

Suggestion of error filed and overruled.

FLOYD WILLIS v. J. L. LOWERY.

[57 South. 418.]

PRINCIPAL AND AGENT. *Intoxication of agent. Grounds of discharge.*

Intoxication covering a period of two or three months on the part of an agent employed as a cotton buyer, to such an extent as to incapacitate him for business, justifies his discharge before the termination of his contract for service, although at the time of the discharge he had quit drinking, as the employer was under no obligation to take further risk.

APPEAL from the circuit court of Hinds county.

HON. W. A. HENRY, Judge.

Suit by J. L. Lowery against Floyd Willis. From a judgment for plaintiff, defendant appeals.

The appellee, who was the plaintiff in the court below, brought suit against the appellant for a balance alleged to be due him as salary. From a judgment for plaintiff, defendant appeals. The opinion states the facts.

On the trial the court, over the objection of the defendant, gave the following instruction at the request of plaintiff, to-wit: "No. 1. If the jury believe that plaintiff quit drinking before December 28, 1909, and was not thereafter incapacitated from performing his duties as cotton buyer for defendant, and did properly perform his duties thereafter, then the jury will find for the plaintiff in the full amount sued for, with six per cent interest from March 1, 1910."

The court refused the following instruction asked by the defendant, to-wit: "No. 1. The court instructs the jury for the defendant that if you believe from the evidence that, unknown to the defendant, the plaintiff had been drunk during the greater part of the months of October, November, and December, A. D. 1909, so as to so seriously interfere with the proper discharge

of his duties to defendant, and that defendant discharged him as soon as he found out this fact, then it makes no difference that at or about the time of the discharge plaintiff sobered up without the knowledge of defendant, still defendant had a right to discharge him, and the jury will in such case find for the defendant.”

W. J. Croom and Powell & Thompson, for appellant.

We contend that the court manifestly erred in refusing the following instruction asked for by the defendant, to-wit:

“No. 1.—The court instructs the jury for the defendant that if you believe from the evidence that unknown to the defendant the plaintiff had been drunk during the greater part of the months of October, November and December, A. D, 1910, so as to seriously interfere with the proper discharge of his duties to defendant, and that defendant discharged him as soon as he found out this fact then it makes no difference that at or about the time of the discharge the plaintiff sobered up without the knowledge of defendant. Still the defendant had a right to discharge him and the jury will in such case find for the defendant.

Defendant and other witnesses testified to the facts recited in this instruction and if they were true manifestly appellant had a right to discharge his agent when he ascertained the real facts and it makes no difference that at the time of his discharge appellee had quit drinking; appellant was certainly under no obligation to take any further risk in the matter. He had a right to judge the future by the past and for good cause discharge an unfaithful servant.

J. H. Thompson for appellee.

The only instruction refused defendant (appellant) of which he now complains is as follows:

“The court instructs the jury for the defendant that if they believe from the evidence that unknown to the

defendant the plaintiff had been drunk during the greater part of the months of October, November and December, A. D., 1909, so much so as to seriously interfere with the proper discharge of his duty to defendant, and that defendant discharged him as soon as he found out this fact, then it makes no difference that at or about the time of the discharge plaintiff sobered up without the knowledge of the defendant, still defendant had a right to discharge him and the jury will in such case find for defendant."

In view of the evidence this instruction would have been erroneous. In the first place it assumes a discharge of the servant, which was not proven. In the second place, it entirely ignores the proof that the salary for the months mentioned was not sued for, having been paid, and entirely ignores the proof that services were required and rendered for the two months in which the plaintiff did not drink.

The jury was left free to say whether Lowery was discharged. It said he was not.

The jury was left free to say whether Lowery was incapacitated from rendering his master good service. It said he was not.

The questions of fact raised in the case were fairly submitted to the jury—the jury believed the fact presented by the plaintiff, and the judgment should stand.

SMITH, J., delivered the opinion of the court.

Appellant is a cotton buyer at Jackson, but maintains an office at Mt. Olive. In August, 1909, appellee was employed by appellant to buy cotton for him at Mt. Olive, at a salary of sixty dollars per month for six months, beginning September 1st. On the 28th day of December following appellee having up to that time purchased very little, if any cotton, appellant wrote him the following letter, which was duly received: "12/28/09. J. L. Lowery, Esq., Mt. Olive—Dear Sir: We shall have

to discontinue our present arrangement there on the 1st January, but will try to buy some cotton in the market later on a commission basis of 3 points. Yours truly, Floyd Willis.”

According to appellant's evidence, the reason why appellee failed to purchase any cotton was that he had been for the months of October, November, and December practically all the time under the influence of intoxicating liquor to such an extent as to incapacitate him for attending to business. Appellee admits that he had been drunk a good many times during these months, but claims that at no time while on duty was he incapable of attending to business, and states that the reason he bought no cotton was that the limit given him by appellant was lower than that of other buyers. Appellant's letter discharging appellee was written a few days after he ascertained the fact of appellee's use of intoxicating liquors. Appellee states that he declined to acquiesce in this discharge, and so wrote appellant, who denies having received the letter. Appellee bought some cotton after December 28th, for which appellant offered to pay him a commission; but he declined to accept it, and instituted this suit to recover his wages for January and February, and succeeded in obtaining a judgment therefor.

If it be true that appellee used intoxicating liquor to the extent and for the length of time that appellant claims he had, then appellant was justified in discharging him when he ascertained that fact, and it makes no difference that at the time of his discharge appellee had quit drinking. Appellant was under no obligation to take any further risk in the matter. It was, therefore, error for the court to grant instruction No. 1 for appellee, and to refuse instruction No. 1 for appellant.

Reversed and remanded.

GRANT NEAL v. STATE.

[57 South. 419.]

CRIMINAL LAW. *Character of accused. Particular acts.*

While a witness introduced as to the character of accused for peace or violence can testify as to his general reputation on that subject, it is error to compel him to testify as to the details of a number of independent fights, etc., in which it was claimed that defendant had been engaged.

APPEAL from the circuit court of Yalobusha county.

HON. N. A. TAYLOR, Judge.

Grant Neal was convicted of assault and battery with intent to kill and appeals.

The facts are sufficiently stated in the opinion of the court.

Creekmore & Stone, for appellant.

We commend the court to that greatest of all books of its kind, Wigmore on Evidence, sections 977 to 989, inclusive. Here it is shown, in a masterly discussion of character from conduct, and especially from particular acts, that the questions of the district attorney in the case at bar would not have been admitted in any jurisdiction in the country. The reasoning is so clear and foreful, and accords so perfectly with the feelings of common humanity and justice, that it seems that the courts would not be called upon to reiterate the doctrine that particular acts of moral delinquency could not be inquired about. Especially would this seem to be the case in a state like ours, where a plain statute limits the inquiry to "conviction of crime," and uses proof of his conviction merely, against his credibility as witness. Even after conviction had been inquired about in the case at bar, and shown by complete evidence,

these matters would have to have been preceded by a question to the appellant on cross-examination, followed by a denial of the conviction by the appellant. Our position on this question is especially upheld by the decision of Justice Calhoun in the recent case of *Dan Cook v. State*, in discussing section 1746 of the Code of 1892, of which section 1923 is an exact copy. We quote from Judge Calhoun's opinion, 38 So., p. 112: "That section simply permits witnesses to be interrogated as to whether they had been convicted of any offense—the purpose being, of course, to go to their credibility—and the statute allows their statement to be contradicted; but it is nowhere, provided by the law, even upon this matter of credibility, that testimony might be introduced as to the conviction of a witness unless the witness had first denied it."

In addition to the above we have a case in the Mississippi court which is exactly in point on this assignment of error, and covers the ground as thoroughly as it is possible. We refer to the case of *Kearney v. State*, 68 Miss. 223, 8 So. Rep. 292.

Frank Johnston, assistant attorney-general, for appellee.

Upon a review of the whole case on the testimony both for the state and the defense, I respectfully submit that the action of the court on these various points of evidence could not have effected the result of the trial reached by the jury. It may be fairly said that all of these objections are immaterial and the rulings of the court on them are non-prejudicial and, moreover, the rulings of the court on these questions of evidence are correct.

Argued orally by *W. I. Stone*, for appellant.

Argued orally by *Frank Johnston*, assistant attorney-general for appellee.

WHITFIELD, C.

We think the court erred in allowing several character witnesses to be examined with respect, not to the general reputation of the defendant, but minutely with respect to a number of independent transactions, fights, etc. Wigmore on Evidence, sections 977 to 989, inclusive; *Kearney v. State*, 68 Miss. 223, 8 South. 292.

There was considerable conflict in the testimony on the merits. The testimony with respect to character for peace or violence showed the defendant to be an exceptionally good negro in this regard, and the person assaulted to be the worst negro possible in this regard—a very dangerous negro. In this state of the record, we cannot say with confidence that no different result would have been reached if the very damaging illegal testimony pointed out had been excluded, as it should have been.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the case is reversed and the cause remanded.

Reversed and remanded.

JOHN McCORKLE v. ILLINOIS CENTRAL RAILROAD
COMPANY.

[57 South. 419.]

1. SUPREME COURT. *Exceptions. Instructions. Stenographer's notes.*

Where a peremptory instruction was given by the court and so marked and filed by the clerk, and no motion for a new trial was made, but an exception to the action of the court in granting this instruction was taken at the time, it was given and in due course, a bill of exceptions consisting of the stenographer's notes, embodying all of the evidence was filed, it became a part of the record and was reviewable on appeal without a motion for a new trial.

2. SAME.

In such case where the evidence in the case is made a part of the record by a bill of exceptions, it will be looked to by the court on appeal in order to determine the correctness of the lower court's ruling.

APPEAL from the circuit court of Carrol county.

HON. G. A. McLEAN, Judge.

Suit by John McCorkle against the Illinois Central Railroad Company. From a judgment for defendant, plaintiff appeals.

This action was begun by the appellant, who was the plaintiff in the court below, and is for damages for injuries alleged to have been sustained by him while attempting to debark from the passenger train of the appellee. The railroad company set up contributory negligence of the plaintiff as a defense to the action. There was a peremptory instruction for the defendant, and the plaintiff appeals.

McClurg & Conger for appellant.

This honorable court will not find a written peremptory instruction in the record. One in writing was not requested, nor granted. This is supported by the record. It cannot be denied. It will not be. The record shows, as the truth is, a verbal motion to instruct the jury to find for defendant. The court verbally did it. No law for it, but all law against it. For this reason the judgment should be reversed. The jury had no instructions but the dictatorial oral order of the judge to find for the defendant. Code, sec. 793. Let the transcript of the record be challenged and a thousand *certioraris* be ordered—no written instruction can be produced. In short, it was a hurried "run-over," unlawful from engines of No. 5 and No. 2 to a hurried Saturday p. m. (as the record shows) "run-over" order by the unusually patient circuit judge. The damages actually inflicted seems from the evidence not to have been se-

rious. But, we most respectfully submit, that there was such an "integration" of facts as to take the case entirely out of the hemisphere of those "rare cases where the 'judge,' at his desk" should assume more practical every day knowledge of the usual actions of men under most vitally trying circumstances. If we are safe on the facts, the law will take care of itself.

C. L. Sivley and Mayes & Longstreet for appellee.

Counsel now contend that this case should be reversed because the peremptory instruction for defendant was not written out, and was delivered orally by the court. Sufficient answer to this is that, even conceding that the instructions were delivered orally, and even conceding that there is merit in counsel's argument that a written instruction should have been given, appellant cannot, under repeated decisions of this court, raise this question for the first time in this court.

The court will observe that no motion for a new trial was ever requested by plaintiff below. A bill of exceptions was presented and signed by the judge, and of course a general bill of exceptions would not avail to have this point considered by this court, unless there were also a motion for a new trial.

But even conceding that this was intended for, and is accepted by this court as a special bill of exceptions, no exception is made to the oral submission of the peremptory charge.

The bill of exceptions is, as shown by the record as follows:

"To the entry of said judgment the plaintiff, by his counsel, then and there excepted, and prays an appeal to the supreme court, which was granted. Counsel for plaintiff in open court, requested the official stenographer, and said stenographer agreed, to file a typewritten copy of the stenographic notes taken down in said cause within the time prescribed by law.

“Plaintiff, by his attorneys, presents this his bill of exceptions in this cause, to the judge of said court, and prays that the same may be allowed and signed by the said judge as part of this record in this cause, which is accordingly done on this the —— day of November, 1910. Filed Dec. 19, 1910. J. P. Nabors, Clerk; Geo. A. McLean, Judge.”

Conceding that this is a sufficient special bill of exceptions to the giving of a peremptory instruction for defendant, it does not except specially to the oral granting of this instruction. This point is raised for the first time in this court, and of course this court will not consider it.

A special bill of exceptions to a judgment of the court will not be considered by this court as a special bill of exceptions to the oral granting of a peremptory instruction.

Even conceding that the instruction was given orally, it is manifest that if the attention of the court had been called to this inadvertence it would have been corrected, and it was due the court that its attention should have been called to it.

Second. As the bill of exceptions was only to the judgment of the court in granting a peremptory instruction this court will, of course, not consider the first assignment of error with reference to overruling objections made by counsel for plaintiff to questions to witness and answers, as to the drunkenness of one Thomas, and to the vague and general second assignment of errors which designates no particular and specific rulings. *Richberger case*, 90 Miss. 806.

SMITH, J., delivered the opinion of the court.

The evidence introduced by the plaintiff in the court below was excluded, and a peremptory instruction was granted, charging the jury to find for the defendant. No motion for a new trial was made; but an exception to

the action of the court in granting this instruction was taken at the time it was given, and, in due course, a bill of exceptions, consisting of the stenographer's notes, embodying all of the evidence was filed.

When an instruction is marked "Given," or "Refused," and filed by the clerk, it becomes a part of the record; and, if duly excepted to at the time it was given or refused, the action of the court in giving or refusing the same may be reviewed in the supreme court on appeal, although no motion for a new trial was made. If the evidence in the case is made a part of the record by a bill of exceptions, it will be looked to by the court in order to determine the correctness of the lower court's ruling. Formerly such a bill of exceptions must have been taken and signed by the judge before the jury retired from the bar; but under our present practice of having the evidence taken down by an official stenographer, and afterwards transcribed, this is not necessary, but the stenographer's notes, when transcribed and approved, becomes the bill of exceptions. *Barney v. Scherling*, 40 Miss. 320; *Railroad Co. v. Chastian*, 54 Miss. 503; *Bourland v. Board of Supervisors*, 60 Miss. 996; *Alexander v. Flood*, 77 Miss. 925, 28 South. 787.

Under the evidence, it was for the jury to say whether or not appellant was guilty of contributory negligence, and, consequently, the peremptory instruction ought not to have been given.

Reversed and remanded.

F. O. HORNE v. J. B. McALPIN, ADMINISTRATOR.

[57 South. 420.]

ESTATE OF DECEDENTS. *Claims. Probation. Record. Sufficiency.*

The supreme court will affirm a decree of the chancery court sustaining objections of an administrator to the allowance of claims against the estate of a decedent, on the ground that the claims were not probated as required by law, where the record does not contain the evidence of debt attempted to be probated.

APPEAL from the chancery court of Newton county.

HON. SAM WHITMAN, JR., Chancellor.

In the matter of the estate of R. M. Wells, deceased. From a decree sustaining the objections of J. B. McAlpin, administrator to claims of F. O Horne, claimant appeals.

The facts are fully stated in the opinion of the court.

Chalmers Alexander for appellant.

It appears that in making up the record the clerk failed to make a copy of the note. On page 7 of the record are the words in parentheses "note not on file with papers and therefore cannot make copy." It is shown however that the note was presented before the court (page 7) and the clerk as a witness examined the note and testified in regard to it. It is not the fault of the appellant that the records fails to include copy of the note. And appellant has taken steps for a rule on the clerk of the court below to find and make copy of the note.

It may not be amiss to state (with permission of opposing counsel) that shortly after this case was tried in the court below the county court house and its library and most of the papers were destroyed by a fire which

began in the night time. Hence the record is very ragged. We mention this as explaining no doubt the reason why the note, which was examined by the attorneys and the court and shown in evidence is not probably to be found now.

Another matter may be mentioned here. The three claims were filed for probate in 1908. Not until December, 1910, did the matter of the contest of the claims come up for hearing before the chancellor. In fact the contest itself was not filed until June, 1910. But it appears that an original account was actually filed by Horne showing the fifteen hundred and ninety-five dollars and forty-two cents; and that account for sixty-nine dollars and eighty-four cents and tax receipt totaling ninety-eight dollars and twenty-nine cents were filed for probate; and that the note for one thousand and sixty dollars was actually filed for probate. Hence, if by lapse of time, and destruction of the court house, the record is to an extent in defective condition, we yet respectfully urge upon the court a decision upon the merits of this vital question.

S. A. Witherspoon, Jr., for appellee.

But not only are none of these claims copied in the record, but the record shows that it is impossible to have any of them copied therein for the reason that neither the note nor either of the accounts nor the tax receipt have been left on the file among the papers in the cause, and it is therefore impossible for the clerk to furnish this court a record containing said note and accounts, and it will, therefore, be impossible for this court to ever get a record by which it could properly determine whether the decree of the court below in disallowing said claims was correct or not.

It is stated in the brief in behalf of appellants on the merits of this case on page five that the appellant has taken steps for a rule on the clerk of the court below

to find and make a copy of the note; but it is also stated on the same page of the same brief, that shortly after this case was tried in the court below that the county court house, and its library and most of the papers were destroyed by fire, which began in the night time, and that this record is very ragged, and that this fire is no doubt the reason why the note which was examined by the court below is not found in the record.

Of course, this explanation is merely opposing counsel's statement outside of the record why this note is not copied in the record, and the same explanation is no doubt intended to account for the absence of the account for fifteen hundred and ninety-five dollars and forty-two cents, and the small account for sixty-eight dollars and ninety-five cents and the tax receipt for twenty-eight dollars and forty-five cents.

It may be that as suggested by counsel that these papers have been destroyed by fire; but we think that the real reason why this note and these accounts are not in the record in this case is because the appellant, Dr. F. O. Horne was at all times unwilling to leave the notes and the accounts and tax receipt with the chancery clerk. These papers were not among the files of the court at the time of the trial of the court below, and one of the grounds of the objection to said claims was because said papers were not left on file among the court papers in said cause, as will be seen by reference to the objections in writing to said claims.

At the time of the trial Dr. Horne, appellant, did not have the one thousand and sixty dollar note with him, and his counsel had to send him off on the train to his home at Union, Miss., to get the note, and probably the other papers in the case, and the trial had to be delayed until the Doctor could return with his note and accounts. So our explanation why this note and accounts are not in the record in this case, is that the appellant, Dr. Horne, took said papers away with him after said claims

were disallowed, refusing to leave them on the file with the chancery clerk as he had done before.

The chancery clerk does not state that any of the papers in this case were destroyed by fire, but does state on record, page seven, in a parenthetical note as follows: "No note on file with papers, therefore cannot make a copy."

SMITH, J., delivered the opinion of the court.

This record does not contain the note or either of the accounts attempted to be probated, and consequently we have no means of determining whether they are such claims as could be or have been legally probated.

It follows, therefore, that the decree of the court below must be affirmed. *Affirmed.*

MRS. M. J. McALLISTER v. S. M. RICHARDSON.

[57 South. 547.]

1. TIME OF TAKING APPEAL. *Limitation. Appearance. Citation. Delay in prosecuting. Dismissal. Code 1906, section 4906.*

An appeal is perfected by the filing of an appeal bond within two years after decree which stops the running of the statute of limitations, though no citation is served.

2. APPEAL AND ERROR. *Appearance. Citation.*

Where an appeal from a decree rendered in the third supreme court district was perfected by the filing of an appeal bond in July, and in October the appellees moved in the supreme court to docket and dismiss the appeal, such motion was overruled, as the docket of the third district is called on the first Monday of December, that day by virtue of Code of 1906, section 4906, being the return day for appeals from that district, and citation for appellees was unnecessary for by their motion to docket and dismiss the appeal they entered their appearance before the return day for appeals from that district.

3. APPEAL AND ERROR. *Delay in Prosecution. Dismissal.*

Where the record in a cause had been filed in the supreme court and appellees appearance had been entered more than ten days prior to the return day for an appeal there was no such delay in the prosecution of the cause after taking the appeal as will warrant a dismissal.

APPEAL from the chancery court of Tippah county.

HON. J. T. BLOUNT, Chancellor.

Suit by Mrs. M. J. McAllister against S. M. Richardson. From a decree for defendant, plaintiff appeals.

Motion in supreme court to docket and dismiss appeal.

Spright & Spright, for motion.

Fontaine & Fontaine and *Flowers, Alexander & Whitfield, contra.*

SMITH, J., delivered the opinion of the court.

The final decree in this case was rendered on the 2d day of October, 1909, and the appeal bond was executed and filed on the 26th day of July, 1911; but no citation has been served on appellees. On the 20th day of October, 1911, appellees filed a motion to docket and dismiss for the following reasons: (1) Because the decree in said cause by the chancery court of Tippah county was rendered on the 2d day of October, 1909, and the appeal bond was filed July 25, 1911. (2) Because no citation has ever been issued or served on appellees. (3) Because no transcript has been filed in the supreme court. (4) Because of delay on the part of appellant in properly and promptly prosecuting said appeal. Afterwards, on the 25th day of November, 1911, the record was filed with the clerk of this court.

The case of *Beasley v. Cottrell*, 94 Miss. 254, 47 So. 662, seems to hold that the filing of an appeal bond does not stop the running of the statute limiting the time within which appeals must be taken, but that the statute continues to run until the appellee is served with a citation, or the transcript filed in this court. That case

was decided upon the authority of *Chambliss v. Wood*, 84 Miss. 209, 36 So. 246. As pointed out in the case of *Lumber Co. v. Stevenson*, 89 Miss. 678, 42 So. 796, this is a misconception of what the court held in *Chambliss v. Wood*, caused by the imperfect reports of that case. What the court in fact did hold in *Chambliss v. Wood* was that "the appeal is perfected on the filing of the bond, which stops the running of the statute." The appeal in the present case, therefore, was not barred by the Statute of Limitation.

The docket of the third district, from which district this appeal comes, at the October term of this court, is called on the first Monday of December, which day was by section 4906 of the Code the return day for appeals from that district. When appellees filed their motion to docket and dismiss, they thereby entered their appearance in this court, and citation for them therefore became unnecessary.

When the return day for this appeal arrived, the record in the cause had been filed and appellees' appearance had been entered more than ten days prior thereto. There was, therefore, no delay in the prosecution of the cause after the taking of the appeal, and, it being now on the docket, the motion to dismiss is overruled.

Overruled.

101 Miss.]

Brief for appellant.

SOUTHERN LUMBER & MANUFACTURING COMPANY v. W. E. MALLETT.

[57 South. 548.]

1. JUSTICE OF THE PEACE. *Answer of garnishee. Time of filing. Appeal. Code of 1906, sections 2345-2347.*

Where a party was garnished in a justice of the peace court and failed to answer on the day required by section 2347, Code of 1906, and judgment was rendered against him in said court, he cannot on appeal to the circuit court for the first time make answer in that court to such garnishment over the objection of the *garnishor*.

2. SAME.

Where in such case the answer of the garnishee is filed without objection and remains on file for a long time the objection will be considered to have been waived.

APPEAL from the circuit court of Hinds county.

HON. W. A. HENRY, Judge.

Garnishment by W. E. Mallett against the Southern Lumber & Manufacturing Company. From a judgment in the justice of the peace court for the garnishor, the garnishee appealed to the circuit court and from an order sustaining an objection to the filing of an answer in that court, the garnishee appeals.

The facts are sufficiently stated in the opinion of the court.

Willing & Davis, for appellant.

We submit that the motion to strike the answer of the appellant (the garnishee) from the files should have been overruled. There is a conflict in the decisions of this court on that question. This court held in the recent case of *Gulf & Ship Island Railroad Company v. C. H. Ramsey*, Mss. Opinion, No. 2060, that a garnishee against

whom judgment by default had been rendered in the court of the justice of the peace could not file for the first time in the circuit court an answer to the writ of garnishment. The very opposite was decided by this court as late as the March term, 1908, in the case of *Mitchell v. Mead*, 92 Miss. 596. We quote from the syllabus as follows:

“A garnishee against whom a judgment by default has been rendered in the court of a justice of the peace may appeal therefrom and his answer, although filed in the circuit court for the first time, should not be stricken from the record because not filed in the justice’s court.”

It may be that this latter decision was overlooked by the court in rendering the latter decision. This case is not referred to in the brief of counsel, nor is it mentioned in the opinion of the court.

It has uniformly been held by this court on appeal from the judgments of a justice of the peace, the case is triable *de novo*, and that any proper defense may be set up for the first time in the circuit court, and it does not make any difference whether or not the judgment was rendered by default in the lower court.

One of the reasons given by the court in the case of *Ramsey v. G. & S. I. R. R.*, *supra*, is that the answer of a garnishee is like a set-off. It has been held repeatedly that a set-off cannot be filed for the first time in the circuit court on appeal because it is a cross action and must be filed in the justice of the peace court. We respectfully submit that there is no analogy between the answer to a writ of garnishment and a set-off. The answer is simply defensive, and it has always been held that matters of defense can be filed for the first time in the circuit court on appeal from the justice court. If this court stands by its latest utterance, then the case of *Mitchell v. Mead*, *supra*, will have to be expressly overruled. Should the court overrule that case, still nevertheless the learned circuit judge erred in refusing to allow the garnishee to file his answer.

Lemuel H. Doty, for appellee.

The court below did not err in sustaining the motion of plaintiff to strike from the files the answer of the garnishee filed for the first time in the circuit court. The answer should have been filed in the justice court on the return day, as prescribed by statute.

The lower court was following this court in the case of *Gulf & Ship Island R. R. Co. v. C. H. Ramsey*, see Opinion, No. 2060. The principle of law enunciated in this case is the correct interpretation of the law, as written.

The case of *Mitchell v. Mead*, 92 Miss. 596, is not in point, and if it is, it was overruled by the opinion in the case of the *Gulf & Ship Island R. R. Co. v. C. H. Ramsey*, Opinion 2060.

MAYES, C. J., delivered the opinion of the court.

There is only one question in this case that needs discussion; all others, we think, having already been settled by this court in several decisions. The appellant was garnished in a justice of the peace court on a judgment recorded by appellee against W. L. McDaniel. Appellant failed to answer on the day required by section 2347 of the Code of 1906, whereupon the justice of the peace rendered judgment for the amount of appellee's demand, as required by section 2345 of the Code. Subsequently the lumber company appealed to the circuit court, and for the first time undertook to file an answer to the garnishment, which was objected to by appellee. and the trial court sustained the objection and refused to allow the answer to be filed. Appellant excepted to the action of the court, and the case is appealed to this court.

It is argued by appellant that this court held in the case of *Mitchell v. Mead*, 92 Miss. 596, 46 South. 58, that the answer of the garnishee could be filed, for the first time, in the circuit court, and that the above case is in

conflict with the case of *G. & S. I. R. R. Co. v. Ramsey*, 54 South. 440, in which last case it is argued that the court held that the answer could not be filed. Section 2347 of the Code of 1906 is clear and positive as to when the answer of the garnishee shall be filed. The case of *G. & S. I. R. R. Co. v. Ramsey*, 54 South. 440, but redeclares the statute. Of course, this section may be waived, and is waived if the party having the right to object to the filing of the answer out of time allows same to be filed without objection, and this was what was done in the case of *Mitchell v. Mead*, 92 Miss. 596, 46 South. 58. In the *Mitchell* case the court does not predicate its opinion upon the fact that the statute requires the answer to be on file at a certain time. The opinion of the court does not allude to the statute. The facts in the *Mitchell* case show that the answer was filed in the circuit court for the first time, and allowed to remain on file for more than three years, when a motion was made to strike the answer from the files, and the trial court sustained the motion, not because an answer could be filed out of time, but because the right to object had been waived by allowing the answer to be filed, and remain on file, without objection, for so long a time.

There is no conflict between the above cases, and the judgment of the court below is affirmed.

Affirmed.

JENNIE MINTER v. CITY OF JACKSON.

[57 South. 549.]

KEEPING LIQUOR FOR SALE. *Acts of 1908, chapter 115. Evidence.*

In a prosecution for keeping liquor for sale under acts of 1908, chapter 115, providing that the fact that any person shall be found in possession of appliances adapted to retailing intoxicating liquors, shall be presumptive evidence that he is keeping for sale intoxicating liquors contrary to law, where the evidence showed that defendant was found in possession of large quantities of intoxicating liquor a part of which was kept concealed, and empty beer bottles in large numbers, and empty glasses with fresh beer in them, corkscrews and beer openers were found, it was a question for the jury whether defendant was keeping intoxicating liquors for sale, although there was testimony tending to show that any liquor drunk on the premises was drunk by friends of defendant, and was not sold.

APPEAL from the circuit court of Hinds county.

HON. W. A. HENRY, Judge.

Jennie Minter was convicted of keeping liquor for sale and appeals.

This is an appeal from a conviction of keeping liquor for sale. The appellant was prosecuted in the police court of the city of Jackson under an ordinance making criminal laws not amounting to a felony offenses against the city. From a conviction she appealed to the circuit court, where she was again convicted. The opinion state the facts.

On the trial of the circuit court, the following instructions were given:

FOR THE CITY.

(1) "The court instructs the jury, for the city, that it is not necessary that you should know that the defendant is guilty before you are authorized to convict,

but only that you should believe from the evidence beyond a reasonable doubt that she is guilty in which event you should say by your verdict. 'We, the jury, find the defendant guilty as charged.' "

(2) "The court instructs the jury, for the city, that if you believe from the evidence beyond all reasonable doubt that Jennie Minter, the defendant had in her possession or under her control ten quarts of Schlitz beer in the refrigerator on ice, and twenty-six quarts of Schlitz beer concealed in the back yard in a tub, and that the same was kept by her for the purpose of selling it, then it is the sworn duty of the jury to return the following verdict in this case: 'We, the jury, find the defendant guilty as charged.' "

(3) "The court instructs the jury, for the city, that if you believe from the evidence beyond all reasonable doubt that ten quarts of Schlitz beer were found in the refrigerator in the defendant's house, and also a beer opener, a waiter with four beer glasses, empty quart bottles which had contained Schlitz beer, and empty flasks, that all these things may be considered by you in making up your verdict; and if you further believe from the evidence beyond a reasonable doubt that all these articles were found in the possession of the defendant, and that they were appliances adapted to retaining either whisky or beer, then, under the law of the state of Mississippi, this would be presumptive evidence of the defendant's guilt."

FOR THE DEFENDANT.

(1) "The court instructs the jury, for the defendant, that it is their solemn duty to try honestly, fairly, and conscientiously to reconcile the testimony in this case with the defendant's innocence, and to return a verdict of not guilty, unless from all the evidence in the case they believe beyond every reasonable doubt that the defendant kept the liquor with the intent and for the purpose of selling the same."

(2) "The court instructs the jury, for the defendant, that the defendant is presumed by law to be absolutely and entirely innocent of the crime charged, and of every act and intent composing the crime, and that this presumption acts as a witness for the defendant, testifying for the defendant throughout the trial, until the jury reach their verdict, that the defendant is innocent; and unless you believe from the evidence beyond every reasonable doubt that the defendant is guilty, it is your solemn duty to find the defendant not guilty."

(3) "The court instructs the jury, for the defendant, that the crime of keeping intoxicating liquors for sale is composed of two separate and distinct elements: First, the physical act of keeping the liquors; and, second, the mental intent to sell the liquor—and that, although the defendant may have had the liquor, yet unless you believe beyond every reasonable doubt that she intended to sell the liquor, and that she kept it there for the purpose of selling the same, it is your duty to find the defendant not guilty."

(4) "It is the right of all persons to keep as much intoxicating liquor in their possession as they may wish, whether it be kept concealed or unconcealed, and to order just as much and just as often as they may wish, provided they do not keep the same for the purpose of selling it; and in this case, if you believe that the defendant ordered the liquor or kept the liquor for her own use, or if you have a reasonable doubt as to whether she did or did not, it is your duty to find the defendant 'not guilty.' "

(5) "The court instructs the jury, for the defendant, that you may believe from the evidence beyond every reasonable doubt that the defendant in this case had in her possession various quantities of intoxicating liquors, and had received numerous shipments of such liquors at numerous times through the express company, yet the receipt and possession of such liquors is not to be re-

ceived by you as sufficient evidence of the defendant's guilt, and raises no legal presumption of the defendant's guilt, but is on the contrary wholly consistent with the defendant's innocence, for the simple reason that she might have received and had such liquors for any one of a number of purposes, and that before you can convict the defendant you must believe beyond every reasonable doubt that the defendant had the liquors for the purposes charged in the affidavit, and for no other."

W. J. Croom, for appellant.

Now I am aware, that the court said, in the Willie Gillespie case reported, in the 51 So. 811, 96 Miss. 856, that where proof of the appliances was made, and the defendant offered no proof, to rebut the presumption, then the jury was warranted in convicting, but the court further says, in the same case that a mere denial, by the defendant, that she had unlawfully sold intoxicating liquors, would have been sufficient, to overcome the presumption, and the court in the same case quoting Mr. Wigmore, on evidence, says: "If the opponent does offer evidence to the contrary, the presumption disappears, as a rule of law." Yet in this case the appellant not only denies that she sold intoxicating liquors, but it is shown, from the record, that a part of the liquor, and beer belonged to another party, and yet the court refused the fourth instruction asked by the appellant, which instruction, simply stated the law, as this court stated it in the Gillespie case, with its quotations from Mr. Wigmore, which, I say was fatal error on the part of the trial court.

See the case of *Gillespie v. The State*, 96 Miss. 856, 51 So. 811. And I say that every instruction given by the court, for the city was erroneous because of the fact, that there was no evidence to support them, unless the simple fact, of a person, having intoxicating liquors, in his possession, with an instrument to open the vessel

containing the liquor, and a glass to drink it out of, would warrant a conviction of the person of keeping the stuff for sale, and this I maintain, has never been the law, is not the law, and in my humble judgment never will be the law. Therefore I say that this woman has been wrongfully convicted, without authority of law, and the case should be reversed.

Jas. R. McDowell, assistant attorney-general, for appellee.

The appellant was convicted of keeping liquor for sale under section 1747 of the Code as amended by chapter 115, of the acts of 1908. The proof shows that on Saturday evening, she received a cask containing seventy-two quarts of beer. On Sunday morning the police raided her establishment, and found seventy-two quart bottles, thirty-six were full of beer, and the other thirty-six were empty scattered around the room, where there were also whisky bottles, a corkscrew, and waiter with tumblers containing the leavings of fresh beer. The appellant did not take the stand but one of her companions testified that four of the girls drank the thirty-six bottles the night before. This would be an average of about a water-bucket full apiece. At any rate, the jury had the benefit of all the testimony and convicted the defendant.

Our court has recently sustained convictions in two cases, under practically the same facts. See *Gillespie v. State*, 96 Miss. 856, and *Price v. Gulfport*, 52 So. 486. I feel no hesitancy in stating that the court will not reverse this case on the facts.

Counsel complains because the court refused three instructions found on pages 9, 10, and 11, of the record.

Instruction No. 2, page 9, is clearly erroneous, because on the weight of evidence, and again it is in the face of the statute which makes possession of these appliances presumptive evidence that the defendant is en-

gaged in the unlawful sale of liquor, or keeping same for sale.

The third instruction, and the fourth, were clearly in the face of the statute.

Louis C. Hallam, city prosecuting attorney, for appellee.

I maintain that the holding of the majority of the court in this case is in direct and irreconcilable conflict with the decision of the court in the case of *Gillespie v. State*, 96 Miss. 856, 51 So. 811, and that either that case ought to be expressly, unequivocally and squarely overruled, or that the judgment of the court in the present case ought to be set aside and the judgment of the lower court affirmed.

In the *Gillespie* case, *Gillespie*, a negro woman, was indicted for selling liquors unlawfully. The state proved that at her home she was found in possession of several glasses recently used for holding beer, possibly a corkscrew and beer-opener, and, hidden underneath the bottom plank of the back steps to her house, a quantity of bottled beer in a box. This was practically all of the evidence for the state. The defendant offered none. The state invokes the aid of section 1747, Code of 1906, as amended by chapter 115, Laws of 1908. A conviction was had and this court promptly affirmed the case.

In that case it was urged by Mr. R. P. Thompson, counsel for *Gillespie*, that the appliances were not such appliances as were contemplated by the statute, according to my recollection, and the court ignored the contention. That *Gillespie* did not deny that she was keeping liquor for sale, and that the appliances were used for that purpose, does not affect the case. The fact remains that the court held that these were appliances adapted to retailing within the meaning of the statute, and allowed the conviction to stand, and compelled *Gillespie* to suffer the law's judgment. In effect that case and the case at bar stand on exactly the same footing

before this court, for in the case at bar the jury has said that they did not believe the testimony offered by appellant, not personally, but through others, tending to rebut the presumption of law. So the presumption stands un rebutted, as in the Gillespie case.

These are the facts as they appear in the record in this case, and as stated in the unanswerable dissenting opinion of Mr. Justice McLEAN; after the officer had found ten quarts of beer in the icebox, defendant denied that she had any other intoxicating liquors on the premises; but the officer of the law found an additional quantity in a tub in the yard covered up with old clothes and weighted down with coal. The proof shows that seventy-two quarts of beer reached this house on Saturday night about ten or eleven o'clock, and that on the following morning thirty-six quarts had been consumed; empty beer and whisky bottles were found; empty glasses with fresh beer in them were found on a silver waiter; and corkscrews and beer-openers were at hand. If anything, the facts in this case are stronger than those in the Gillespie case. If this be true, and the judgment already entered is upheld, should not the Gillespie case be expressly overruled?

But I say that the Gillespie case should not be overruled either expressly or by implication. It is right, and any other holding on the appliance feature means a total annihilation of the statute, section 1747 by judicial legislation.

If the legislature had intended that the question: What are appliances? should be a question of law, it would either have enumerated the appliances, or would have expressly stipulated that this question should be a matter for the court to determine. It did not do either. It is therefore unmistakably and uncontrovertibly, as stated in the dissenting opinion, a question of fact pure and simple. This is what the court held in *State v. Cunningham*, 25 Mass. 202, where it is said:

“With what intent a person keeps intoxicating liquors is always a question of fact for the jury, to be determined upon a view of all the evidence. And in disposing of that question they are required by the statute to consider the keeping of the articles in the manner specified in the statute as presumptive evidence of an unlawful intent. But that evidence may be rebutted and controlled by the circumstances, as would be the case in the instances of the sexton and carman alluded to, as well as by any other evidence in the case, whether shown by the accused in his defense, or by the state in connection with the evidence proving the possession. With such evidence the jury may also take into consideration the presumption of the innocence of the accused.” *State v. Cunningham, supra*.

In other words, not only is the question, What are appliances? a question of fact for the jury, but whether the legal presumption created by proof of the possession of such appliances has been overcome by the evidence is also a question of fact for the jury. That is, the presumption on the one hand, and the evidence tending to overcome the presumption on the other, go to the jury, and their determination that the presumption has or has not been successfully rebutted is final.

MAYES, C. J., delivered the opinion of the court. .

Appellant was prosecuted by the city of Jackson for keeping vinous, spirituous, malt, and intoxicating liquors for sale, in violation of an ordinance framed under chapter 115 of the acts of 1908 amending section 1749 of the Code of 1906. The proof consists in the fact that appellant is shown to have received a cask containing seventy-two quarts of beer a day or two prior to the time a “raid” was made on her house by the police authorities of the city of Jackson. When the police authorities raided appellant’s house, they found about thirty-six quarts of beer, and the other thirty-six empty

quart bottles. It seems that the police also found a few whisky bottles, a corkscrew, a waiter, and some tumblers containing the leavings of fresh beer. Appellant did not take the stand, but a witness testified that four girls, friends of appellant, drank the thirty-six bottles the night before. It appears from the testimony that only a part of the beer belonged to Jennie Minter; the other belonging to another woman who lived in the house with her. A bottle with a little whisky in it was found. This is all the evidence in reference to Jennie Minter keeping this whisky in violation of the law.

As this court has repeatedly said, there is no law which prohibits a person from keeping whisky, no matter what the quantity, unless it is kept for some unlawful purpose, and when the above charge is made the proof must not only show that the person charged had intoxicating liquors, but that the liquor was kept for an unlawful purpose. The testimony in this case does no more than create a suspicion that the beer found was kept for an unlawful purpose, if it can be said to do that. That a person ordered a cask of beer raises no presumption that he ordered it for an unlawful purpose. When a house is searched, and it is discovered that the beer has been put to the use which it might be supposed the party ordering it intended it should be, and for which it is made, and when it additionally appears that the beer had been opened with a corkscrew and drunk from a glass, this is not sufficient to warrant the presumption that it was kept for an unlawful purpose. When section 1747 of the Code of 1906, as amended by acts of 1908, p. 117, provides that the fact that any person has in possession appliances adapted to the retailing of liquor shall be presumptive evidence that the person having the appliances is engaged in keeping intoxicating liquors for sale, or for the purpose of giving same away in violation of law, it does not and cannot mean that when a home is invaded and searched, and glasses,

and a waiter, and a corkscrew, and intoxicating liquors are found, that these things alone shall warrant the conviction of any person under this statute. The glasses, waiter, corkscrew, and sometimes intoxicating liquors, are found in many innocent homes. In fact, a home cannot be properly furnished without glasses and waiters. If these things be found in a storehouse, or in and about a person's place of business, this fact may be a stronger circumstance of guilt than when found in a home; but in all cases these things alone cannot be said to be such appliances, within the meaning of the statute, as to warrant a conviction in themselves. It may be difficult to prove the crime charged in this affidavit, and it should be. The legislature has not said that it shall be unlawful to keep whisky for any purpose, and, when a person is found with intoxicating liquors at his home, this fact should not, in itself, warrant the presumption that such person has liquors for an unlawful purpose, unless other facts are sufficient to justify a conclusion that the having of the liquors is for some unlawful purpose. This case falls within the principles declared by the case of *McComb City v. Hill*, 56 So. 346, and *Stansberry v. State*, 53 So. 783.

The case is reversed and remanded.

McLEAN, J. (dissenting).

I regret exceedingly that I cannot see my way clear to agree with my Brethren in this cause. The majority of the court concede that there were no errors of law committed in the court below. They must concede that the only question which the record presents is a question of fact, and this question of fact, having been properly submitted to and passed upon by the jury, should not be disturbed, except in extreme cases—in other words, the record should overwhelmingly convince this court that the verdict of the jury was wrong upon the facts. In my humble judgment this is not done; but, upon the

other hand, there is ample testimony to sustain this verdict. The reporter will set out in full the instructions given for both the state and the defense, in order that it may be seen that the jury were not only properly charged, but that they were instructed on behalf of the defendant from every conceivable viewpoint that the evidence would permit.

Section 1747 of the Code, as amended by chapter 115 of the acts of 1908, provides, among other things, as follows: "The fact that any person shall be found in possession of appliances adapted to retailing such liquors shall be presumptive evidence that the person is engaged in keeping for sale . . . intoxicating liquors contrary to law." I am unable to draw any distinction between the instant case and *Gillespie v. State*, 96 Miss. 856, 51 So. 811, 926. I have carefully read the record in the Gillespie case, and the facts in that case are strikingly identical with the facts in the instant case. In both cases a portion of the intoxicating liquors were kept concealed; empty beer bottles were found in large numbers; empty glasses with fresh beer in them were found; corkscrews and beer openers were at hand, and the places where they were—in fact, everything well calculated to convince a jury, composed of reasonable men, that the defendant did not have this large quantity of intoxicating liquors on hand for her sole use and benefit, but upon the other hand, is presumptive evidence of guilt under that portion of the statute hereinbefore quoted, and placed upon the defendant the burden, at least, of making some explanation.

In the first place, the defendant in the instant case, when the officer first appeared with his search warrant, and after he had found ten quarts of beer in the ice box, denied that she had any other intoxicating liquors on the premises; but the officer of the law found an additional quantity in a tub in the yard, covered up with old clothes and weighted down with coal. The proof shows

that seventy-two quarts of beer reached this house on Saturday night, about ten or eleven o'clock, and that on the following morning thirty-six quarts had been consumed by the inmates of that establishment, consisting of four girls. In other words, each girl had consumed nine quarts of beer and was sober—not intoxicated; and everything about this establishment indicated that this large quantity of intoxicating liquors was not kept for private use. It does not require a very great stretch of the imagination to conclude that this house was a bawdyhouse. However all this may be, this court is encroaching upon the province of the jury when it undertakes to reverse this case upon the facts shown in the record. It is respectfully insisted that the majority opinion of this court (and it must be borne in mind that this is simply a court of review) is not at all consistent with the course of a court of review. The rule in such cases is that if there is any evidence at all to support the findings of the jury, there being no error in the record, the verdict should not be disturbed.

No one questions the right of an individual to purchase, for his own use, as many quarts of beer or as many gallons of whisky as his thirst demands. There is very little danger that any "gentleman of standing," in whose possession may be found quantities of beer and whisky, is apt to be convicted of violating the liquor laws by a jury. A person's standing in the community has a great deal to do in forming, and in shaping, and leading to a conclusion, the judgment of a jury. It is not usual for the innocent to keep hid out in the back yard intoxicating liquors, in a tub covered with old clothes, and weighted down so as to conceal the same from the passer-by; nor is it usual and customary to find empty beer glasses, with fresh beer in them, in every room in the house. While "wine, women, and song" are frequently found together, yet, at the same time, we are not authorized, innocent though we may

be, to shut our eyes to a matter of common knowledge, and that is that bawdyhouse keepers are not in the habit of furnishing beer and other intoxicating liquors free of charge to their inmates, but, upon the other hand, such things are kept as additional revenues to these dens of infamy; and those who go there are expected, "while they enjoy the songs of the sirens," to pay the fiddler by purchasing beer and paying exorbitant prices for these "incidental" amusements. These "incidentals" are a part of the traffic. They assist largely in maintaining the "dignity" of the establishment. It is true there is no direct evidence in this record that the appellant kept a bawdyhouse, yet here and there through the record, are seen glimpses of those things which indicate that such is the case. At all events, the jury in this case, so far as the record shows, fairly and impartially considered the facts; and it should be a very extreme case in order to justify this court in setting aside the verdict of a jury.

This court need not be at all sensitive about a violator of the liquor laws being unjustly punished. Long experience and observation of the writer of this opinion, in the *nisi prius* courts, convinces him that a large percentage of those who violate the prohibition laws escape punishment. The courts cannot be too rigid in the enforcement of a law, the violation of which is the mother of so much evil and crime—the ruin and degradation of so many of our people.

ON SUGGESTION OF ERROR.

SMITH, J., delivered the opinion of the court.

An examination of the original record in the case of *Gillespie v. State*, discloses that it is, if anything, a weaker case for the state than the one at bar, and, consequently, I am of the opinion that we erred in reversing the judgment of the court below. That case, which will be found reported in 96 Miss. 856, 51 So. 811, de-

cided three propositions: First, that the statute, in question was constitutional; second, that the evidence of the appliances found in appellant's possession was sufficient to raise the presumption of guilt created by the statute; and, third, that the court below complied with the statute in granting the instructions to the jury. As reported in each of these reports, the case is of no value on the second proposition, for the reason that neither of them contain a statement of the facts. In that case appellant was found in possession of intoxicating liquor in bottles of convenient size, and, in the language of the witness, "there were whisky glasses and common tumblers setting around." In one room of the house empty beer bottles, with a little beer and foam remaining in them, were found on the table. In the case at bar appellant was found in possession of intoxicating liquor in bottles of convenient size, glasses, waiters, a beer opener, and an ice box containing beer on ice. Empty beer glasses, with fresh beer in them, were found in every room in the house. There was also some other evidence in each of these cases indicating that beer had been recently drunk on the premises, and in each case, after appellant had denied having intoxicating liquor in possession, such liquor was found on the premises, appellant's residence, some of it concealed in the yard.

It is true that the possession of the appliances found on appellant's premises is consistent with her innocence, and, were it not for the statute in question, no inference of guilt could be drawn therefrom alone; but since the legislature has made such possession evidence of guilt, it is ordinarily for the jury, and not the court, to say whether it is sufficient to constitute proof thereof. Of course, the presumption of guilt raised by the statute will be stronger or weaker, according to the character of appliances found and the circumstances surrounding their possession. The evidence introduced by appellant, if true, was sufficient to overthrow the

prima facie case she was called upon to meet; but the credibility of the witness delivering it was for the determination of the jury, and an examination of this testimony will disclose that they were well warranted in rejecting it.

As I am in accord with the views heretofore expressed by my Brother McLEAN, it follows that the former judgment herein must be set aside, and the judgment of the court below affirmed. *Affirmed.*

MAYES, C. J. (dissenting on the sustaining of the suggestion of error).

In the original opinion filed in this case I have substantially stated the facts. There is no hint in this record, falling from the lips of any witness, that Jennie Minter was keeping a house of bad character. As was stated in the opinion, the proof in the case only shows that thirty-six bottles of beer belonged and were found in the room of appellant. She is charged with keeping intoxicating liquors for sale. Ten bottles were found in an ice cooler in her house and twenty-six bottles were found in the yard in a tub. Where the liquors were found seems to me to be immaterial, since mere possession did not constitute guilt. We must interpret human nature as we find it, and not as we would have it. When homes are to be raided in the search for intoxicating liquors, we may expect the timid and the fearful to hide it from the officers of the law. Since the statute does not condemn the mere having of the intoxicating liquor in possession, it cannot matter where it is kept. In the *Stansberry case*, 53 So. 783, and the *Hill case*, 56 So. 346, this court has held that mere quantity, in the absence of proof of other unlawful purposes, even under the statute, cannot justify a conviction of having intoxicating liquors for purpose of sale or giving away in violation of law. In the *Stansberry case*, Stansberry had a gallon of gin and four quarts, or a gallon,

of whisky. This court said a conviction could not stand, even under the statute in the case. In the Hill case, the court said the same on facts which showed about the same quantity of whisky.

What is this statute, to which such strong appeal is made? When the statute is examined and analyzed, it is narrower than the scope given it by this opinion of the court in this case. The legislature designed to keep it within constitutional limits, but the court is about to press it beyond those limits. The statute does not say what the court has construed it to mean, in my judgment. The statute in question is section 1747 of the Code of 1906, as amended by acts 1908, p. 117, sec. 1, and it provides, in substance, that the having of a revenue license from the United States government, authorizing the selling of intoxicating liquors, shall be *prima facie* evidence that any person having such license is engaged in keeping for sale, or to be given away to induce trade, or in selling liquors, in violation of law. No proof warranting a conviction under this clause of the statute is found in the record. Again, the statute provides that any person "who shall be found in possession of appliances adapted to retailing" shall be presumed to be engaged in violating the liquor laws, as above stated. If this conviction is to stand, it must rest alone on the fact that when this home was raided the policemen found a waiter, a corkscrew, and some tumblers. These were the only "appliances" that any witness says were found in this house. These cannot be said to be "appliances adapted to retailing liquors" in any sense of the statute, because they are articles of necessary household utility, and not a single householder but that could be prosecuted and convicted under the statute. The finding of thirty-six bottles of beer at this house is not proof of anything, because this court has so held in two cases.

My own view is that the statute making the having of appliances adapted to retailing *prima facie* evidence of

guilt strains the constitutional power of the legislature to its utmost limit. It is possibly within the constitutional power of the legislature to prohibit whisky from being imported into this state or kept in any home; but, if it be conceded that the legislature have this power, they have not done it, and until they have exerted the power intoxicating liquors may be kept in a home in moderate quantities, without being any kind of proof of a violation of the liquor laws of the state. However much it may be desirable to enforce the prohibitory laws of the state, this court cannot allow itself to be swept from its judicial poise, and affirm convictions on facts which neither prove nor tend to prove any violation of the law.

It is my judgment that in this case there was no proof to go to the jury.

MAGGIE HALL FORRESTER v. WM. FORRESTER.

[57 South. 553.]

DIVORCE. *Condonation. Friendly correspondence.*

Where in a suit for divorce by the wife there is ample evidence of cruel treatment by the husband extending over several years, a divorce should not be denied because the wife after such treatment wrote her husband a friendly letter.

APPEAL from the chancery court of Monroe county.

HON. J. Q. ROBINS, Chancellor.

Suit for divorce by Maggie Hall Forrester against Wm. Forrester. From a decree denying the divorce, complaint appeals.

The appellant brought suit against appellee for divorce, and obtained a decree in her favor carrying ali-

mony. Afterwards a petition was filed by appellee to set aside the decree on the ground that appellee had never been served with summons. After hearing proof, the court set aside the decree and proceeded to a new hearing of the case. Upon hearing the proof, the court denied appellant a divorce. The letter alleged to have been written by appellant to appellee January 7, 1910, referred to in the opinion, is as follows:

“My address is Aberdeen, Miss., R.-No. 5.

“ABERDEEN, MISS., Jan. 7, 1910.

“Dear Bill: I will write you a few lines; Allie said you said write you so I will, it is so bad I can't take the baby to town but when the weather gets good I am going to Aunt Julia Gallop's to stay few days and I will let you know so you can come and see her and me if you want to, don't ever come over here any more. You know how Papa is when he gets mad at any one so you shall see the baby and I will talk to you. Also write me if you got home alright and don't tell nobody I wrote this to you and when I know I can be in town I will also let you know, don't ever come till I let you know. God in heaven knows if you only had done right we would have been together now and none of this would ever happened. I pray for you night after night but don't think of the past and nothing that happened over here. I want to talk to you and will if I ever have the chance. Write me if you got home, I hated to see you go back but I could not help it. Reba said for me to write and see if her dady got home that night, it was so bad. So be good and write to me soon. May God bless you. M. F. Burn this up and don't let anybody see it for my sake.”

Paine & Paine for appellant.

Cruel and inhuman treatment, does not necessarily involve the proof of personal violence. The treatment must be habitual, cruel, but not habitual personal violence.

The case of *Johns v. Johns*, 57 Miss., is in point. The case of *Pierce v. Pierce*, 38 So. 46, states the rule in this state, and says personal violence is not required in order to constitute such cruel and inhuman treatment as will authorize the granting of a divorce.

Leftwich & Tubb for appellee.

We now come to the correspondence between appellant and her husband which we submit shows clearly that she is still attached to him, and all that is needed for them to resume their relations is a little time and an opportunity for her to get from under the domination of her father. It will be observed that in January, 1910, the same month in which the first decree for divorce was taken without notice, and only a short time before the decree was taken, Forrester rode from Smithville to the home of his father-in-law who was then living on Mr. Plant's place near Prairie, some thirty miles, to see his wife, that he did see his baby and that he tried to see his wife, and that she made an engagement to see him but that her father intervened. On the 7th of January, 1910, she wrote her husband this letter:

"My address is Aberdeen, Miss. R. No. 5.

ABERDEEN, MISS., January 7th, 1910.

Dear Bill, I will write you a few lines; Allie said you said write you so I will, it is so bad I can't take the baby to town but when the weather gets good I am going to Aunt Julia Gallop's to stay a few days and I will let you know so you can come and see her and me if you want to, don't ever come over here anymore. You know how papa is when he gets mad at any one, so you shall see the baby and I will talk to you. Also write me if you got home alright and don't tell nobody I wrote this to you and when I know I can be in town I will also let you know, don't ever come till I let you know. God in heaven knows if you only had done right we would have been together now and none of this

would ever happened. I pray for you night after night but don't think of the past and nothing that happened over here. I want to talk to you and will if I ever have the chance. Write me if you got home, I hated to see you go back but I could not help it. Reba said for me to write and see if her dady got home that night, it was so bad. So be good and write me soon. May God bless you. M. F. Burn this up and don't let nobody see it for my sake."

SMITHVILLE, Miss., Jan. 15, 1910.

Mrs. Maggie Forrester:

I will try to answer your letter, I had a bad time coming home when I was over there but got home all right. It rained all day on me the day I was there and sleeted on me next day. I never have told nobody that I ever went over there and don't expect for nobody to know anything about it. I want you to let me know when you can go to our aunt Julies and I will come to see the baby and will talk to you. I will not write much now but will tell you what I want you to know when I see you. I would love to see you and Reber the best in the world. So I will quit hoping to hear from you soon. Write soon, from W. E. Forrester."

We submit that this letter written by Mrs. Forrester in which she took the initiative and in which she proposed going visiting at the home of her aunt, Mrs. Gallop, near Cotton Gin and not far from where Forrester lived, and where he could see her and the baby, shows her innermost thoughts and love for her husband.

Single acts of cruelty do not entitle the wife to a divorce. *Johns v. Johns*, 57 Miss. 530. 9 A. & E. Enc. Law (2 Ed.), 812, 14 Cyc. 601. Not only must it be true that a single cruel act even if proven will not grant a divorce, but there must be in addition repeated acts of cruelty reasonable apprehension of its repetition or of bodily harm in the future. *Kenley v. Kenley*, 2 Howard, 751. In passing upon the ground of divorce, the

court must view the general conduct of the parties. 14 Cyc. 601.

We do not deem it necessary to further quote authorities, but we submit to the court, that from this whole record, from beginning to end, the decree of the chancellor dismissing the bill of appellant was clearly right. There was not only no sufficient ground for sustaining the bill as is shown by the record, but, as we submit, the record clearly shows that this woman and man are still attached to and love each other, and that there is abundant ground to believe that they will if left unhindered resume their marital relations, and jointly rear the little child which was born to their union.

Argued orally by *Geo. C. Paine*, for appellant and *G. J. Leftwich*, for appellee.

WHITFIELD, C.

We concur in the conclusion reached by the chancellor that the first decree for divorce should be set aside; but, after careful consideration of the whole record on the merits, we are constrained to differ from him in denying the divorce and dismissing complainant's bill. The marked ability of the learned chancellor would constrain an affirmance, if we were not thoroughly satisfied from the whole evidence and by the deductions to be drawn from it that the complainant has satisfactorily made out her case. The testimony is not limited to a single act of violence, but covers their relations and his treatment of her for several years. That he struck her is certainly clearly established, and the blow was so severe as to blacken the arm and cause it to remain so for about a week or more. It seems clear, too, that in his rage he broke up and destroyed certain trinkets and toys that had belonged to their dead child. She had left him once before, but had returned in the hope of being able to live with him; and the evidence, we think,

makes it plain that she left the second time in great fear of what he might do to her if she should remain. All the testimony relative to his cursing her, and his conduct in respect to taking home things which belonged to her, and the return of which she secured only after a vigorous suit at law, coupled with many other circumstances scattered through the record, such as, for example, making her work barefooted in the field, makes it seem to us certain that justice required the granting of the divorce.

We are impressed with the idea that the chancellor must have given too much weight to the letter which the wife was alleged to have written to her husband. The sum and substance of her testimony as to whether she wrote the letter was that she would not testify positively that she wrote it, or did not write it; that she may have written it, but she did not believe she had done so. Even if she had written the letter, as seems most probable, that fact does not negative the treatment of her by him in the past, which the evidence abundantly shows. That treatment is not such as holds out much hope of better relations in the future, should the divorce be denied and the parties united again. The question is, not whether that letter was written or not, but whether, on the whole case, she was entitled under the statute to the divorce. We think she was.

As the bill calls for alimony, no decree will be entered here, but the cause will be remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the decree setting aside the first decree for divorce is affirmed; but the decree denying the divorce on the second hearing and dismissing complainant's bill is reversed, and the cause is remanded, to be proceeded with in accordance with this opinion.

Reversed and remanded.

M. A. CANDLER v. KING CROMWELL ET AL.

[57 South. 554.]

1. JUDGMENTS. *Chattel mortgages. Liens. Priority.*

A judgment lien takes effect on a growing crop only from the time it has an actual existence, the lien does not relate back to the rendition or enrollment of the judgment; but a lien of a mortgage on a growing crop relates back to the date of its creation and takes effect from the date of the execution of the mortgage, thereby taking precedence of a judgment.

2. MORTGAGES ON GROWING CROPS. *Amount secured.*

When a trust deed specifies that the mortgagee will furnish a specified sum, followed by the words "more or less," it does not fix any limitation on the lien which is created by the mortgage, in case the mortgagee, with the assent of the mortgagor, exceeded the amount actually named in the face of the mortgage and when the mortgagor and mortgagee have agreed, by the mortgagee furnishing and the mortgagor accepting the excess furnished, there is no field for speculation as to what was meant in the contract by the use of the words "more or less," because the parties to the contract have definitely settled it, and when no fraud is charged third parties have no right to complain.

3. SAME.

The courts construe doubtful contracts when the parties themselves cannot agree as to the true meaning; but when the parties agree, and the contract is made certain, there is no field for interference by the court.

4. RIGHTS OF JUDGMENT CREDITOR.

A judgment creditor succeeds to only such rights in the judgment debtor's property as the judgment debtor actually has, and is barred by all the equities which bar the judgment debtor, and can assert no demand that the judgment debtor is precluded from asserting.

5. CHATTEL MORTGAGES. *Definiteness. Future advances.*

A mortgage to secure future advances need not definitely specify the amount to be furnished; it is sufficient if it merely specify

that it is given to secure such future advances as may be agreed upon.

6. SAME.

Such a mortgage is sufficient to put a purchaser or incumbrancer on inquiry, and if he fails to make it in the proper quarter, he cannot claim protection as a *bona fide* purchaser.

APPEAL from the circuit court of Alcorn county.

HON. J. H. MITCHELL, Judge.

Suit by M. A. Candler against King Cromwell et al.

From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Bennet & Sweat for appellant.

This trust deed does not show that it is given to secure future advances; but even though it did, it could be security for no more future advances than fifty dollars, the sum stated. "A trust deed to secure future advances is good to the extent of the amount specified when the advances are actually made." 28 A. and E. Ency. of Law (2 Ed.), page 754.

"When future advances are secured, parol evidence may be introduced to identify what advances were in fact intended by the parties, but when the amount of the future advances is specified and that amount was advanced, it has been held not competent to show by parol that the mortgage was intended also to secure a future indebtedness, so as to give a preference over junior incumbrances. 20 A. and E. Ency. of Law, (2 Ed.), page 929.

If this trust deed was given to secure future advances and the open and running account was an account of advances made after the trust deed was given, the trust deed specifically limits it by stating that it was to be fifty dollars, more or less, the amount of advances which is to be secured.

"The consideration named does not limit the securities for which a mortgage may stand, if the intent to

secure future advances is apparent from the whole instrument; but any mortgage to secure future advances may specifically limit the amount for which it shall stand as security, as by providing that such advances shall not exceed a certain named sum, and in that case, the lien of the mortgage shall be limited as against subsequent incumbrances to the designated amount, although, as against the mortgagor, it may be good for the whole amount actually advanced." 27th Cyc., page 1072.

"A mortgage for a sum certain given in good faith as security for future advances is valid as against general credits of the mortgagor for advances not exceeding the sum specified in the mortgage; and also as against third persons acquiring interest in the mortgaged premises, conveyance, or judgment lien."

If this contract is construed so as to include one hundred and thirty-seven dollars it certainly will be construed to exceed the amount specified for the amount is specified to be fifty dollars, or less.

"A mortgage given to secure an unliquidated demand, or debts of a specified kind, or contracted for a particular purpose, and containing a limitation as to the total amount for which it is to stand as security, must be strictly construed in this respect, and cannot be enlarged; and when the debt is described as being about a certain amount, no indebtedness, however fair and just, can be brought within its terms which is materially in excess of the sum mentioned." 27th Cyc., page 1060.

The debt described here is certainly described as being "about fifty dollars, for more or less" mean "about." The above authority holds that no amount, however fair and just, which is materially in excess of that fifty dollars, can be brought within its terms. One hundred and thirty-seven dollars is very materially in excess of fifty dollars.

Our own court has never construed a trust deed just like this, but it has construed trust deeds very similar

to it, and has stated what we conceive to be the law in this case. In *Hillard et al., v. Cagle*, 46 Miss. 341, the court said: "It is entirely logitimate to give a mortgage for a sum certain named in the deed, when that sum is intended to cover future advances. To the amount named, the security is valid as to third persons, but not beyon it."

In the case of *Wilczinski v. Everman* (54 Miss. 841, where the indebtedness stated in the mortgage was three hundred and fifty dollars and all other indebtedness which may be incurred, the court held that this was sufficient to cover all advances made and was a valid incumbrance, and said: "It is not necessary for a mortgage for future advances to specify any particular or definite sum which it is to secure. It is not necessary for it to be so completely certain as to preclude the necessity for all extraneous inquiry."

But in the case at bar, the sum of any advances was particularly and definitely stated, and sufficiently so as to preclude all extraneous inquiry. The appellant, Candler, had a right to rely on the sum specifically stated in the trust deed.

In the case of *Gray v. Helms*, 60 Miss. 131, the trust deed secured all future advances, but went on and stated that "this deed is made and intended to secure any advances on account of the crop of 1880, made after the maturity hereof, and not mentioned herein." The court said in construing that trust deed that this clause must limit the advances made after maturity to such as should be made on account of the crop of 1880, and that advances made in excess of that sum did not come within the security that it was impossible to give the latter clause any force or meaning, except to place this construction on it; that that clause was not inserted to enlarge the instrument, which needed no enlargement, but rather as a limitation for that which without it was too general and all embracing. We say, in regard to the case

at bar, that in order to give the fifty dollars mentioned in the trust deed any force or meaning, the construction must be that any sum materially in excess of that amount is not within the security.

W. J. Lamb for appellees.

The sole question presented in this case is a construction of a clause in the trust deed given by King Cromwell to C. Ayers which clause is as follows:

“The first party (meaning King Cromwell) is justly indebted to the third party (meaning C. Ayers) in the sum of one hundred and eighty-four and ninety-five one hundredths, more or less, dollars, as evidenced by note of even date herewith, for \$134.95, due Dec. 15, 1910, an open and running account for \$50.00 more or less, as shown on books of third party.”

On this open account Cromwell became indebted to C. Ayers in the sum of one hundred and thirty-seven dollars. Now, the question, is: Does this trust deed cover the one hundred and thirty-seven dollars, or does it only cover a few dollars more than fifty dollars. There is no other question presented in this appeal except this one issue, to-wit: Does the trust deed cover the one hundred and thirty-seven dollars? Our contention is that it does cover it. The contention of the appellant is that it does not cover it. The appellant could have, with ordinary diligence, ascertained how much the defendant, Cromwell, owed Ayers because the trust deed expressly provides for an open and running account of fifty dollars, more or less, as shown on books of third party.

In the case of *Wilczinski v. Everman*, the court says: “A mortgage to secure future advances which on its face gives information as to the extent and purpose of the contract so that a purchaser or junior creditor may by an inspection of the record and by ordinary diligence or prudence, ascertain the extent of the encumbrance,

will prevail over the supervening claim of such purchaser or creditor as to all advances made by the mortgagee within the terms of such mortgage, whether made before or after the claim of such purchaser or creditor arose." *Wilczinski v. Everman*, 51 Miss. 846.

The trust deed was given not only to secure the note but to secure the future advances, and the case falls squarely within the doctrine announced in this case. The doctrine announced in the above mentioned case was reiterated and announced by Justice Calhoun in the case of *Melton v. Williams Co.*, 83 Miss. 630, where he says:

"As in *Wilczinski v. Everman*, 51 Miss. 841, it gives on its face information as to the extent and purpose of the contract so that a purchaser or junior creditor may, by an inspection of the record, or by ordinary diligence and common prudence ascertain the extent of the encumbrance." *Melton v. Williams Co.*, 83 Miss. 630. There can be no question but that a trust deed given to secure future advances is valid and binding and when put of record is notice to the world that is sufficient to put junior creditors or purchasers on inquiry. In so far as a lien is concerned, the appellant in this case is a junior mortgagee or creditor and there is no contention on the part of the appellant that his lien is paramount to the lien of C. Ayers, his only contention being that the mortgage only covers the open account for a few dollars more than the fifty dollars because of the expression "more or less." If the mortgage is a valid mortgage when it is given for future advances and the recording of the same is notice to the world and sufficient to put interested parties on inquiry, as is held by the case cited above, we fail to see by what process of reasoning the appellant should claim the amount should only be fifty-two of the open account, which the trust deed was given to secure.

Whether the ultimate amount intended to be secured should be definitely stated on the face of the instrument

is a question upon which there is considerable diversity of opinion, but the weight of authority sustains the principle that in the absence of statutes providing otherwise a definite statement of amount is unnecessary and that all that can be required is that a mortgage designed to secure such future liabilities should describe the nature and amount of them with reasonable certainty, so that they may be ascertained by the exercise of ordinary diligence on proper inquiry." 20 Am. & Eng. Ency. of Law, page 927.

As was said in the case of *McDaniels v. Calvin*, 42 Am. Dec. 512:

"A description of indebtedness covers future accruing amount where the wording of the condition is to pay him what I may owe him on book."

It is even permissible under the law to offer parole testimony to identify a debt secured by a mortgage which is not sufficiently described.

"Where an existing debt or obligation is secured parole evidence is admissible even against strangers, to the mortgage to identify the debt or obligation intended to be secured." 20 Am. & Eng. of Law, page 928.

There is no trouble, or no question raised, about identifying this debt; there is no dispute about the amount but it is admitted that Ayers advanced the appellee, Cromwell one hundred and thirty-seven dollars and it is agreed that it was furnished him to make his crop for the year, 1910, the very year the trust deed was given.

MAYES, C. J., delivered the opinion of the court.

Briefly stating this case, it is about as follows: In 1908, M. A. Candler recovered a judgment against King Cromwell for seventy-two dollars and twenty-three cents in a justice of the peace court. In November of that year, the judgment was enrolled in the office of the circuit clerk of Alcorn county, in compliance with sec-

tion 2742 of the Code of 1906, and became a lien on all the property owned by King Cromwell, if he owned any. On March 28, 1910, King Cromwell executed a mortgage to one C. Ayers, with W. B. Wilson as trustee, on all live stock and on all crops of corn and cotton to be grown by Cromwell during the year 1910, in Alcorn county, on certain lands described in the mortgage. The controversy over the particular cotton involved in this case is conceded to have been grown during the year 1910 on the land described in the mortgage, and is covered by the mortgage, unless excepted therefrom for reasons to be subsequently stated. The consideration of the mortgage recites that it is given because Cromwell "is justly indebted to the third party [Ayers] in the sum of \$184.95, more or less, as evidenced by note of even date for \$134.95, and an open and running account for \$50, more or less, as shown on the books of the third party, which indebtedness the first party desires and intends by this deed more effectually to secure and make certain payment thereof." The above quotation shows that the trust deed was given for the purpose of securing a note for one hundred and thirty-four dollars and ninety-five cents, and open and running account for fifty dollars, more or less, making in total the sum of one hundred and eighty-four dollars, and ninety-five cents, specified in the face of the trust deed. Under this trust deed it is argued that Ayers furnished Cromwell, not only the fifty dollars specified in the open and running account, but furnished eighty-seven dollars additional, making a total amount furnished of one hundred and thirty-seven dollars, instead of fifty dollars, which, when added to the note of one hundred and thirty-four dollars and ninety-five cents, makes a total indebtedness due Ayers for the year 1910 of about two hundred and seventy-one dollars. Cromwell raised about five and one-half bales of cotton, the value of which is conceded to be less than the amount owing Ayers. The conten-

tion of Candler is that his judgment lien is superior to the claim of Ayers under the mortgage for all value of the cotton in excess of one hundred and eighty-four dollars and ninety-five cents, or about that sum. In other words, Candler claims that the open account was to be for fifty dollars, more or less, and that in the use of this term the amount which Ayers had the right to furnish Cromwell was limited to a sum approximating nearly the sum of fifty dollars; that is to say, about fifty-two dollars or fifty-three dollars, or forty-seven dollars or forty-eight dollars. Candler denies the right of Ayers to assert his mortgage to the full amount furnished under the trust deed, and claims that his judgment lien is superior to the mortgage for the excess. Accordingly, Candler had an execution issued under his judgment and levied on the cotton, whereupon Wilson, trustee in the trust deed, propounds a claim for same. Candler offered to pay Ayers' claim to the extent that the trust deed shows on its face the amount actually named therein; that is, Candler proposed to pay Ayers the note of one hundred and ninety-four dollars and ninety-five cents, and the account of fifty dollars. On the trial in the court below, the court held that Ayers could hold the cotton for the actual amount furnished by him under the trust deed to Cromwell, and awarded the value of the property to the trustee, from which judgment Candler appeals.

In the cases of *Cayce v. Stovall*, 50 Miss. 402, and *Cooper v. Turnage*, 52 Miss. 431, this court held that, while a judgment lien takes effect on a growing crop only from the time it has an actual existence, the lien does not relate back to the rendition or enrollment of the judgment but a lien or mortgage on a growing crop relates back to the date of its creation, and takes effect from the date of the execution of the mortgage, thereby taking precedence of a judgment lien.

When a trust deed specifies that the mortgagee will furnish a specified sum, followed by the words "more

or less," it does not fix any limitation on the lien which is created by the mortgagee, in case the mortgagee, with the assent of the mortgagor, exceeded the amount actually named in the face of the mortgage. The mortgage expressly says that the mortgagor and mortgagee agree that the mortgagee shall furnish to the mortgagor the sum of fifty dollars, "more or less." How much more or how much less may be the subject of agreement between them according to the terms of the mortgage, and when they have agreed, by the mortgagee furnishing and the mortgagor accepting the excess furnished, there is no field for speculation as to what was meant in the contract by the use of the words "more or less," because the parties to the contract have definitely settled it, and when no fraud is charged third parties have no right to complain. The courts construe doubtful contracts, when the parties themselves cannot agree as to the true meaning; but when the parties agree, and the contract is made certain, there is no field for inference by the court.

Let us see where the contention of counsel for appellant would lead us. A judgment creditor succeeds to only such rights in the judgment debtor's property as the judgment debtor actually has. The judgment creditor merely succeeds the judgment debtor; that is, takes his place and subjects the actual interest of the judgment debtor to his demand. The judgment creditor is barred by all the equities which bar the judgment debtor, and can assert no demand that the judgment debtor is precluded from asserting. *Harris v. Hazlehurst Oil Mill*, 78 Miss. 603, 30 So. 273; *Foute v. Fairman*, 48 Miss. 536; *Miss. Val. Co. v. Chicago, etc., R. R. Co.*, 58 Miss. 846. It needs no argument to show that Cromwell could not defeat the lien of this mortgage after accepting advances under it of more than fifty dollars, and for the same reason that he cannot do so his judgment creditor, who merely succeeds to his rights, is also precluded

from doing so. The words "more or less" may have a different meaning when applied to different instruments, and depending upon the way in which the controversy arises. If a person make a deed to another, containing by accurate description so many acres, "more or less," and a controversy should arise as to what was meant, the court might be called upon to construe what was meant. If a person should contract to sell to another one thousand bales of cotton, "more or less," the court might again be called upon to construe what was meant by the use of the words, etc.; but in a mortgage which shows that the parties intended to furnish so much money, "more or less," and when, in fact, by the actual amount furnished under the contract, they make certain how much more shall be furnished, third parties cannot force the court to place any limitation on the meaning of the words different from that which the parties themselves have fixed.

A mortgage need not specify definitely the amount to be furnished. This has been frequently held. The mortgage might have merely specified that it was given to secure such future advances as might be agreed upon. In the case of *Wilczinski v. Everman*, 51 Miss. 841, this court has said: "A mortgage to secure future advances, which on its face gives information as to the extent and purpose of the contract, so that a purchaser or junior creditor may, by an inspection of the record, and by ordinary diligence and prudence, ascertain the extent of the incumbrance, will prevail over the supervening claim of such purchaser or creditor as to all advances made by the mortgagee within the terms of such mortgage, whether made before or after the claim of such purchaser or creditor arose. It is not necessary for a mortgage for future advances to specify any particular or definite sum which it is to secure. It is not necessary for it to be so completely certain as to preclude the necessity of all extraneous inquiry. If it con-

tains enough to show a contract that it is to stand as a security to the mortgagee for such indebtedness as may arise from future dealings between the parties, it is sufficient to put a purchaser or incumbrancer on inquiry, and, if he fails to make it in the proper quarter, he cannot claim protection as a *bona fide* purchaser. The law requires mortgages to be recorded for the protection of creditors and purchasers. When recorded, a mortgage is notice of its contents. If it gives information that it is to stand as security for all future indebtedness to accrue from the mortgagor to the mortgagee, a person examining the record is put upon inquiry as to the state of dealings between the parties and the amount of indebtedness covered by the mortgage, and is duly advised of the right of the mortgagee by the terms of the mortgage to hold the mortgaged property as security to him for such indebtedness as may accrue to him. Thus informed, it is the folly of any one to buy the mortgaged property, or take a mortgage on it, or give credit on it; and, if he does so, his claim must be subordinated to the paramount right of the senior mortgagee, who in thus securing himself by mortgage, and filing it for record, as required by law, has advertised the world of his paramount claim on the property covered by his mortgage, and is entitled to advance money and extend credit according to the terms of his contract thus made with the mortgagor, who cannot complain, for such is his contract; and third persons afterwards dealing with him cannot be heard to complain, for they are affected with full notice by the record, of what has been agreed on by the mortgagor and mortgagee." See, also, *Melton v. Williams Co.*, 83 Miss. 624, 36 South. 152.

The Wilczinski case expressly holds that it is not necessary for a mortgage to specify any particular or definite sum which it is to secure. The meaning of the mortgage, when it says an open account furnished under it shall be fifty dollars, more or less, can become of

importance, in the absence of fraud, only to the parties themselves, when there is a controversy between them as to its meaning. In other words, if the mortgagor had failed to furnish the mortgagee, more than twenty-five dollars, and the mortgagee was suing him for a breach of this contract, the use of the words "\$50, more or less," might become of importance; but it can never be brought into question by third parties, when the parties to the contract have themselves interpreted it by actually furnishing in a certain amount, and when there is no dispute between the parties as to this.

Affirmed.

NEW ORLEANS, MOBILE AND CHICAGO R. R. Co. v.
ANN COLE.

[57 South. 556.]

1. RAILROADS. *Negligence. Injuries to persons on track. Burden of proof. Code of 1906, section 1985. Constitution United States, Fourteenth Amendment. Review..*

Negligence is the failure to observe, for the protection of the interest of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury.

2. CODE OF 1906, SECTION 1985. *Injuries to persons. Burden of proof.*

Under Code of 1906, section 1985, so providing in all actions against railroad companies for injury to persons or property, proof of injury inflicted by the running of locomotives or cars shall be *prima facie* evidence of a lack of reasonable skill on the part of the servants of the company, proof of an injury raises a presumption of negligence, casting the burden of proof on the railroad company. In such case proof that the equipment of a train was proper and that the servants of the company kept a vigilant lookout, is in the absence of any evidence as to the situation of the person injured, not sufficient.

3. CODE OF 1906, SECTION 1985. *Constitution of United States, Fourteenth Amendment.*

Section 1985 of the Code of 1906 is not in conflict with the fourteenth amendment to the federal constitution, in that it does not deprive a railroad company of the equal protection of the laws and of its property without due process of law.

4. APPEAL AND ERROR. *Instructions. Harmless error.*

Where a party to a suit obtains a judgment he cannot complain that the court refused to give him a peremptory instruction, for the jury have done what the party requested the court to peremptorily charge them to do.

5. APPEAL AND ERROR. *Review. Harmless error.*

A party cannot complain of an erroneous instruction where instructions were given at his request embodying the same principle.

APPEAL from the circuit court of Newton county.

HON. C. L. DOBBS, Judge.

Suit by Ann Cole et al. against the New Orleans, Mobile & Chicago Railroad Company. From a judgment for plaintiffs, defendant appeals and plaintiff prosecutes a cross-appeal.

The facts are fully stated in the opinion of the court.

Flowers, Alexander & Whitfield for appellant.

J. D. Jones, R. N. & H. B. Miller for appellees.

No brief of counsel on either side found in the record.

SMITH, J., delivered the opinion of the court.

Joe Cole having been struck and killed, as it is alleged, by one of appellant's trains, this suit was instituted by his widow and daughter to recover damages therefor. Neither side being satisfied with the verdict and judgment for one thousand dollars, rendered against appellant in the court below, each filed a motion for a new trial, both of which were overruled, and the case comes to us on direct appeal by appellant and on cross-appeal by appellees.

The evidence introduced in behalf of appellees was to the effect that on the night of the accident, between 8 and 9 o'clock, Cole was seen walking down the track a short distance ahead of one of appellant's trains, and that just after it had passed him he was found lying near the track with both feet, which had been cut off, lying between the rails, as was also a sack of water-melons which he had with him at the time. The evidence introduced in behalf of appellant was to the effect that Cole was under the effect of intoxicating liquor at the time of the accident; that the train was running slowly, and was carefully handled; that the bell was ringing, and that the whistle had been blown several times for a railroad crossing just a few moments before the accident occurred; that the engine was equipped with an electric headlight, then burning brightly; that the engineer and fireman were each keeping a proper lookout; and that neither of them saw Cole on the track. Other witnesses also testified that they were watching the train as it passed, and that no one was on the track at the place where the accident occurred just before or at the time the engine passed it; that the pilot of the engine was of standard form, and was elevated only four inches above the track; and that there were no bruises on Cole's body, his only injury being the amputation of his feet. From these two last facts it is argued that Cole was not struck by the pilot of the engine, and, consequently, could not have been on the track in front of the train, but fell under the wheels of the cars thereof after the engine had passed. There was also evidence for appellees in contradiction of appellant's evidence relative to the blowing of the whistle and the ringing of the bell.

Appellant complains of the action of the court below in refusing to grant it a peremptory instruction, on the theory that, although the evidence does not show how the accident in fact occurred, it does show that appel-

lant's train was properly equipped that its servants were guilty of no negligence in handling it, and that, consequently, the accident, however it occurred, was not caused by any default on the part of appellant or its servants. In *Railroad Company v. Brooks*, 85 Miss. 275, 38 So. 40, this court laid down the rule governing cases of this character in plain and unmistakable language; this language being as follows: "There is yet another principle of law, well settled in this state, which required the submission of the case to the jury. It was shown beyond peradventure that the injury was inflicted by the running of the train. This was *prima facie* proof of negligence, authorizing a recovery by plaintiff. To overcome this statutory presumption, it devolved upon the appellant to exculpate itself by establishing to the satisfaction of the jury such circumstances of excuse as would relieve it from liability. But this statutory presumption cannot be overthrown by conjecture. The circumstances of the accident must be clearly shown, and the facts so proven must exonerate the company from blame. If the facts be not proven, and the attendant circumstances of the accident remain doubtful, the company is not relieved from liability, and the presumption controls." Since this language has several times been quoted with approval by this court (*Yazoo Railroad Co. v. Landrum*, 89 Miss. 399, 42 So. 675; *Easley v. Railroad Co.*, 96 Miss. 399, 50 So. 491; *Railroad Co. v. Hunnicutt*, 53 So. 617; *Fuller v. Railroad Co.*, 56 So. 783), it would seem that argument relative thereto should now be closed; but, out of deference to counsel, we have again taken the matter up for consideration.

Negligence, as defined by Judge Cooley, is "the failure to observe, for the protection of the interest of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury." 29 Cyc. p. 415. Under section 1985 of the Code, when proof is made of in-

jury inflicted by the running of locomotive or cars of a railroad company, the presumption arises that such company had failed to observe for the protection of the interest of the person injured that degree of care, precaution, and vigilance which the circumstances justly demanded; and it then devolves upon such company to exculpate itself by establishing to the satisfaction of the jury that it did not fail to observe that degree of care, precaution, and vigilance which the circumstances justly demanded. Unless the circumstances surrounding the parties at the time of the infliction of the injury be known, it cannot be ascertained what degree of care, precaution, and vigilance, if any, was due from the company to the party injured; consequently, it cannot be determined whether the company failed to observe the necessary degree of care, precaution, and vigilance. We may know exactly what the situation of the servants of the company was at the time of the infliction of the injury, and exactly what they did; but, unless we also know what the situation of the party injured was, and what he was doing, at the time, we cannot know the degree of care, precaution, and vigilance, if any, which the company, or its servants, owed to him, and consequently cannot know whether or not they neglected to observe such degree of care, precaution, and vigilance.

In suits to recover damages for an injury alleged to have been inflicted by reason of the negligence of a defendant, except in cases where a presumption of negligence arises from the proof of certain facts, the plaintiff must show the circumstances attending the infliction of the injury, so that it may be known what degree of care, precaution, and vigilance, if any, the defendant owed to the plaintiff, and whether or not this degree of care, precaution, and vigilance was observed by the defendant. In other words, that it may appear whether or not the injury was inflicted by reason of the defendant's negligence. Under section 1985 of the Code the

plaintiff is relieved of this burden in certain cases, and under it, in all actions against a railroad company for damage done to persons or property, when proof is made of injury inflicted by the running of a defendant's locomotive or cars, the presumption arises that such company, or its servants, failed to exercise that degree of care, precaution, and vigilance which, under the circumstances, the company owed to the party injured, and, in order to overthrow this presumption, the company (defendant) must then do what the plaintiff must have done in the absence of the statute; that is, show the circumstances attending the infliction of the injury, so that it may appear what degree of care, precaution, and vigilance, if any, was due from the company to the plaintiff, and whether or not this degree of care, precaution, and vigilance was by the company, or its servants, observed—in other words, whether or not the injury was, in fact, inflicted by reason of defendant's negligence. *Railroad Co. v. Brooks*, *supra*, simply announces in clear and concise language the rule which had been foreshadowed, if not definitely announced, in *Railroad Company v. Phillips*, 64 Miss. 704, 2 So. 537.

Appellant contends that, if the rule which we have herein reannounced and approved is sound, then *Railroad Co. v. Hunnicutt*, 53 So. 617, was improperly decided. In this appellant is in error. The Hunnicutt case followed and approved the Brooks case, *supra*, and the only new feature therein contained is the announcement that it is not necessary to prove how the injury occurred by eyewitnesses, but that this proof may be made by circumstantial evidence.

Appellant further contends that, if section 1985 of the Code is to be construed as we have herein construed it, then it is in conflict with the fourteenth amendment to the federal constitution, in that it deprives a railroad company of the equal protection of the laws and of its property without due process of law. This contention has been disposed of by the opinion of the Supreme

Court of the United States in the case of *M., J. & K. C. R. R. Co. v. Turnipseed*, 219 U. S. 36, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, in which the court upheld the constitutionality of the statute with the construction put upon it by this court in the Brooks Case before it. The court below, therefore, committed no error in refusing to grant appellant the instruction requested.

Appellant also complains of several instructions granted by the court at the request of the appellees, which, in effect, charged the jury to find for the plaintiff, unless it was clearly shown by a preponderance of the evidence, and not by mere surmise and conjecture, not only how the injury occurred, but that it was unavoidable by the exercise of reasonable care and prudence on the part of the defendant. What we have heretofore said disposes of this complaint of appellant, and shows that the court below committed no error in granting the instructions.

Appellees complain because the court below refused them a peremptory instruction, and claim that for that reason they are entitled to a reversal of the judgment of the court below. Since the verdict of the jury was in favor of appellees, it is immaterial whether or not the court erred in refusing to grant this instruction, for the jury have simply done what appellees requested the court to peremptorily charge them to do.

Appellees also complain that in several instructions granted appellant the jury were charged that if Cole's own negligence contributed to his injury they should find for appellant, which instructions they say may have accounted for the small verdict rendered. Conceding this action of the court to be error, it cannot be complained of by appellees; for this same principle was embodied in several instructions to the jury granted at their request.

The judgment of the court below is therefore affirmed.

Affirmed.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

OCTOBER TERM, 1911.

WALTER S. FISHER v. J. T. WESTMORELAND.

[57 South. 563.]

1. PRINCIPAL AND AGENT. *Malicious prosecution. Liability for agent's acts.*

The principal is liable for the acts of his agent in instituting a criminal prosecution maliciously and without probable cause, if the institution of such prosecution was expressly authorized or subsequently ratified by the principal, or was within the scope of the agent's employment.

2. SAME.

Authority from the principal to an agent to sell property, does not confer authority to prosecute for theft of such property. An expressed authority to prosecute one person, excludes any authority to prosecute another.

3. SAME.

As a caretaker of the property of a principal an agent is authorized to do any and all things necessary to enable him to take care of and preserve the property but this authority extends no further.

If necessary to prevent a person from stealing the property, he is authorized to cause the arrest of such person, not in order to punish him, but to prevent the theft, and in such case an agent has no implied authority to prosecute after an alleged theft has been committed.

APPEAL from the circuit court of Noxubee county.

HON. T. B. CARROLL, Judge.

Suit by J. T. Westmoreland against Walter S. Fisher et al. From a judgment for plaintiff defendant appeals.

The appellee was running a sawmill. He broke his circular saw, and, being in a hurry to get out a bill of lumber, he sent a negro in his employ to an old, abandoned mill in the neighborhood, which he knew was for sale, and which belonged to Walter S. Fisher, and instructed him to get a saw, and bring it to appellee's mill, and see if they could use it. The negro brought the saw, and appellee tried to fit it on his mill, but found he could not use it, and directed the negro to take it back to Fisher's mill. The negro carried it to his own house, where it remained for several days. Fisher lived in another county. In the meantime Fisher's agent, T. W. Crigler, who had been for some time trying to sell the mill, made inquiry about the missing saw, and was informed that Westmoreland had taken it to his mill. While Westmoreland was endeavoring to attach it to his mill, he broke a part called the "mandrel." Upon ascertaining the whereabouts of the saw, Crigler went to the appellee, and told him that Fisher would be mad about it, as he was endeavoring to sell the mill, and advised appellee to go to West Point and see Fisher about it. Appellee did so, and explained the circumstances to Fisher, who then proposed to sell him the machinery for a price which Westmoreland thought too high. Fisher then told appellee that he would write him later.

Thereafter Fisher wrote his agent, Crigler, at Macon, Miss., the following letter: "West Point, Miss., 6/22, 1910. Mr. T. W. Crigler, Macon—Dear Crigler: Mr.

Westmoreland has been up here, and we had a talk about the stuff gone from the mill, and while I want to do the right thing by Mr. Westmoreland, still I have lost the sale of the mill, that can only be attributable to him, and I know that I am treating him as I would want to be treated when I sell him the outfit at what I have in it, which is six hundred and seventy-eight dollars. I am sure this is fair and if not I cannot see why, as I am loser in the transaction, as I would have gotten eight hundred dollars if it had not been tampered with. I also told him to pay one hundred dollars down and balance by December 15th, in notes to suit his convenience, and if this does not suit him this is authority for you to swear out warrant for the negro that took the stuff as my agent. I think Mr. Westmoreland a fair fellow and I anticipate no trouble. Yours, W. S. Fisher.” Thereafter Crigler swore out an affidavit against the negro and Westmoreland, charging them with grand larceny. The case was dismissed by the court after hearing the statements of the defendants. Westmoreland then brought suit against Fisher and Crigler for malicious prosecution, which resulted in a judgment against both defendants jointly for the sum of five hundred dollars, from which each defendant prosecutes a separate appeal.

The declaration contains the following language: “The said affidavit was made by the said Crigler as the agent for and at the instance and request and upon the direction of the defendant Fisher; both the said Crigler and the said Fisher knowing full well at the time same was made and directed to be made that the said charge was not true that plaintiff had committed the crime of larceny or any other crime with respect to the said Fisher’s property; but the affidavit was made by the said Crigler for the said Fisher upon his (the said Fisher’s) request and direction, and as the agent of the said Fisher, without probable cause and with malice,” etc.

Gates T. Ivy and *A. F. Fox*, for appellant.

It is contended that, in as much as Crigler was the agent of Fisher and charged with the superintendence and care of the property involved, the authority to prosecute for stealing the property, in some way, inhered in, and grew out of this general authority to take care of the property, and was incident thereto; in other words was in the scope of this general authority.

This contention might well be met by the fact, as conclusively shown by the evidence, that Crigler did not make the affidavit for larceny under his general authority as such caretaker. He never would have acted at all in the prosecution if he had not received the letter. The contention of counsel might also be met by the mere statement this is not the case made by plaintiff's declaration. The declaration does not allege that Crigler made the affidavit against Westmoreland under his general authority as caretaker of the property, and acting within the scope of that authority. On the contrary, it distinctly alleges that the affidavit was made by Crigler "at the instance and request and upon the direction of Fisher."

But for the sake of argument, let us meet counsel upon their own ground, and see to what conclusion the law and the facts will lead us.

The facts of the case are that Fisher was the owner of an unused sawmill several miles from the city of Macon where Westmoreland resided and where he operated a mill of his own. The saw at Westmoreland's mill having been injured, Westmoreland sent the negro, Duran, with a team out to Fisher's mill, which was not in operation, with instructions to take the saw and bring it home, which the negro did, and broke the mandrel, in taking the saw off. This was about the 1st of May, according to the testimony. The affidavit for larceny was made against Westmoreland and the negro on the 27th of June, six or seven weeks afterward. Crigler

also lived in the city of Macon and was employed as salesman by the Fisher Company, of which Fisher was president. This company was a mercantile concern at West Point. The Fisher and other creditors had purchased bankrupt stock of goods at the mill, and Crigler was made trustee. After this was mostly sold out, Fisher bought the old mill, and Crigler who visited the mill two or three times a month was directed by Fisher to look after the mill property. This was the whole extent of his authority as agent. Some weeks after the saw was taken, Crigler missed it and instituted an investigation, and after two weeks search, from that time it was in possession of Westmoreland and was at his mill in Macon. Instead of having Westmoreland arrested, the idea not occurring to him that it was his duty or that he was authorized to do it, he reported it to Fisher and saw Westmoreland and as a friend, advised him to go to see Fisher about it. He never acted in the premises any further until he received Fisher's letter, when he took steps to have the negro alone arrested, and on consulting an attorney and the justice of the peace included Westmoreland in the affidavit, not on the authority of the Fisher, but solely on his own responsibility under the advice of his lawyer. This is the whole story. What is the law?

A well considered case is *Markely v. Snow*, 207 Pa. S. C. —, 64 L. R. A. 685. This is a case, where an action for malicious prosecution was instituted against a partnership engaged in selling and mining coal. The plaintiff was arrested for burning defendant's barn, at the instance of defendants superintendent who had the care and management of the property. The plaintiff was arrested three months after the barn was burned. The question was whether the arrest, was an act within the implied power of the superintendent, done in the course of his employment. The court say:

“Undoubtedly, a principal may be held liable for the act of his agent in instituting a malicious prosecution.

But the act of the agent becomes that of the principal only when expressly authorized, or when his authority to act may fairly be inferred from the nature and scope of his employment. Generally the duty of superintendence does not carry with it the duty to arrest or prosecute.

“The inference of authority to do either does not arise from the mere fact of agency. The authority may be implied when the arrest is made by the agent in the absence of the principal for the protection of the property that is in danger or where the crime is being perpetrated. This principle has been uniformly recognized in the decisions on the subject. Railroads have been held liable for unlawful arrest of passengers by conductors for the nonpayment of fare; and the employer for the arrest by a superintendent for shoplifting, detected, it was supposed, in the act, by a floor walker; for the arrest by a ticket agent on a charge of causing disorder in a theater.”

“On the other hand the trend of decisions is against holding the principal liable when the arrest was made after the supposed crime had been committed, and not for the protection of his property.” *Daniel v. Atlantic C. L. R. Co.*, 136 N. C. 517, 67 L. R. A. —; *Central R. Co. v. Brewer*, 27 L. R. A. (Md.) 63; *Mulligan v. R. Co.*, 14 L. R. A. (N. Y.) 791; *Bernheimer v. Becker*, 3 L. R. A. (N. S.) (Md.) 221; *Carter v. Howe Machine Co.*, 51 Md. 290, 34 Am. Rep. 311; *Little Rock Traction Co. v. Walker*, 40 L. R. A. 473; *Richberger v. Express Co.*, 73 M. 165, 18 Am. and Eng. Ency. Law, 659; *Three-foot v. Nuckols*, 68 Miss. 125, 19 Am. and Eng. Ency. of Law, 685; *Shannon v. Simms*, 40 So. 574 (Ala.); *Kehl v. Hope*, 77 M. 762.

Geo. Richardson and Flowers, Alexander & Whitfield,
for appellee.

It seems to us that it would not be easy to find a more perfect model to illustrate the rule that an agent may

bind his principal in the doing of things which are within the scope of his authority but not within the terms of the express directions given to the agent. Of course if a principal could itemize the agent's duties and relieve himself from the consequences of acts of the agent not so itemized or enumerated there would be few cases left to be tried against the principal. While the agent is doing the things which he is specifically directed to do he does other things which the principal wishes to disclaim. Here the agent signed one affidavit charging two men with the commission of a crime. He was acting as agent for Fisher so he thought. He was specifically authorized to handle this particular transaction and he was the general agent of Fisher too with respect to this property. Fisher admits authorizing him to make the affidavit against Jesse. He learned that Westmoreland was more guilty than Jesse so he just inserted his name in the affidavit. He went very slightly beyond the letter of his conceded authority and he did the act while using the authority given. Crigler says that whatever he did he did for Mr. Fisher; that he had no personal interest in it. He was not an officer.

In the case of *Richburger v. Express Co.*, 73 Miss. 161, it was not pretended that the agent of the express company had any authority to administer corporal punishment to the patrons. When he attacked Richberger he was acting upon his own account to satisfy his personal grievance. He went far beyond any express authorization. If his duties had been enumerated by the company in advance there would have been no mention of assaults and batteries upon persons who might have occasion to demand, the correction of mistakes.

In the case of *Rivers v. Y. & M. V. R. R. Co.*, 90 Miss. 196, it was not required to be shown that the employee who wrote the slanderous letter had authority to do this thing. He did have some authority to do this thing. He did have some authority which he was using at the

time he did what he was not authorized to do. He had directions to make investigations of books and report thereon. While doing this he did a wrongful and unauthorized act. He wrote falsely about Rivers. He was doing it for the benefit of the employer.

In *Railway Company v. Brooks*, 69 Miss. 168, the persons who wrote the various letters and reports about the missing baggage were men employed to serve the company and not to write libels. They had no written authority to bind the employer by their expressions of opinion as to the guilt of Brooks. While performing a duty they were engaged to do they did a thing which was unauthorized. They went beyond their duty and their express authority. They went beyond the letter but were still within the scope of their authority.

In *Williams v. Planters Ins. Co.*, 57 Miss. 759, an agent having no express authority so to do, seems to have made affidavit against Williams charging him with the crime of arson. The court held that the insurance company for which the agent was acting could be held to answer in the suit for malicious prosecution. The court said corporations must answer for the acts of their agents just the same as natural persons; page 764. We say now, from the modern viewpoint, that individuals can be held for the act of their agents just the same as corporations.

It was not made to appear in *McGourik v. Western Union*, 79 Miss. 632, that the agent who sent the improper and foolish message was doing something which he was employed to do. On the other hand it was very clear that he was employed for no such purpose and in sending the message in question he was acting against the best interests of the company and was launched upon an enterprise for his own personal entertainment. If the company had known he would do such a thing he would never have been employed. Yet the company was said to be liable for the agents wrongful act in sending

a slanderous message involving the plaintiff's good name.

In the new Encyclopedia of Law and Practice, vol. 2, pp. 1204 and 1205, it is said:

“Modern Rule.—The present view is that acts done with in the general scope of the agent's authority, while he is engaged in the principal's business render the principal liable even though they are wanton, wilful, or malicious. But when the agent steps aside from the business of his principal and wantonly and maliciously commits an act to accomplish an independent purpose of his own the principal is not liable therefor, unless such an act has been previously authorized or is subsequently ratified.” *Gretzen v. Duenckel*, 11 Am. Rep. 405, 411; *Magor v. Hammond*, 3 L. R. A. (N. S.) (N. Y.) 1038; *Jackson v. Am. Tel. & Tel. Co.*, 70 L. R. A. 738; note to *Waler v. Great Northern R. R. Co.*, 70 L. R. A. (S. D.) 733, 31 Cyc. 1585.

Argued orally by *A. F. Fox*, for appellant.

Argued orally by *J. N. Flowers*, for appellee.

SMITH, J., delivered the opinion of the court.

The principal is liable for the act of his agent in instituting a criminal prosecution maliciously and without probable cause, if the institution of such prosecution was expressly authorized or subsequently ratified by the principal, or was within the scope of the agent's employment. In the case at bar the act of Crigler in instituting the prosecution complained of was never ratified by appellant, and he had no express authority to institute such a prosecution, unless it is contained in the letter written to him by appellant on June 22, 1910, which the reporter will set out in full.

A mere inspection of this letter demonstrates that it contains no such authority. A proposition looking to the sale of the mill to appellee, as an adjustment of the

101 Miss.]

Opinion of the court.

damage sustained by appellant by reason of the taking of the saw and the breaking of the mandrel, was pending between appellant and appellee, and this letter advised Crigler, who was assisting appellant in this negotiation, on what terms appellant would sell the mill, and authorized him, in event the terms of sale were not satisfactory to appellee, to institute a prosecution against the negro, who, at the request of appellee, had taken the saw. Granting, therefore, that this letter authorized Crigler to sell the mill to appellee upon certain terms, authority to sell property does not include authority to prosecute for a theft. And, moreover, the letter, by reason of its express direction to prosecute the negro, excluded any authority to prosecute any other person. "*Expressio unius est exclusio alterius.*"

Unless, therefore, the institution of such prosecution comes within the general authority conferred upon Crigler by reason of his being in charge of the mill as caretaker, appellant is not liable therefor. As such caretaker Crigler was authorized to do any and all things necessary to enable him to take care of and preserve the property; but his authority extended no further. If necessary to prevent a person from stealing the property, he was authorized to cause the arrest of such person, not in order to punish him, but to prevent the theft. The prosecution complained of was not instituted in order to prevent a theft of the property; for appellee's act, whatever it amounted to, upon which the charge of theft was based, had been committed some time before, and the prosecution could only have resulted in punishing him therefor.

It follows, from the foregoing views, that Crigler's act, in instituting the prosecution, was clearly without the scope of his authority. *Markely v. Snow*, 207 Pa. 447, 56 Atl. 999, 64 L. R. A. 685; *Daniel v. Railroad, Co.*, 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455, 1 Ann. case. 718.

Reversed and remanded.

W. H. GURLEY v. STATE.

[57 South. 565.]

1. HOMICIDE. *Dying declarations. Admissibility. Improper argument of counsel. Instructions.*

The competency of dying declarations is exclusively for the consideration of the court.

2. SAME.

Where a dying declaration is admitted in evidence by the court, it then becomes the province of the jury to decide upon its credibility, and the jury in doing so may take into consideration all the circumstances under which the declarations were made, including those already proved to the court and may give to the evidence only such credit or force as, upon the whole they think it deserves.

3. INSTRUCTIONS.

The courts should not single out particular portions of the evidence in a cause, and tell the jury by instructions, that it ought or might consider this, that, or another part of the evidence, in connection, with the other evidence in reaching a verdict.

4. APPEAL. *Record. Conclusiveness.*

The supreme court on appeal, must accept as true the statement of the trial court of its recollection of the proceedings sought to be reviewed.

5. CODE OF 1906, SECTION 1918. *Comment on failure of defendant to testify.*

Under the Code of 1906, section 1918 forbidding counsel to comment on the failure of defendant to testify, the word "comment" as employed in the statute, does not mean to criticise or condemn, or anathematize the accused on his failure to testify. It forbids any comment friendly or unfriendly. It forbids any remark of any character, in any words upon the failure of the accused to testify. The attention of the jury is not to be called to the fact at all by counsel.

6. SAME.

Where counsel does comment on the failure of the accused to testify, the fact that the court tells the jury not to consider such comment will not save the case on appeal from being reversed.

APPEAL from the circuit court of Neshoba county.

HON. GEO. H. ETHRIDGE, Special Judge.

W. H. Gurly was convicted of manslaughter and appeals.

Among other instructions granted by the court for the state is the following: "No. 6. The court charges the jury, for the state, that the dying declaration is legal testimony, and if they believe beyond a reasonable doubt in this case that shortly before the death of the deceased, and at a time when he was conscious and believing that death was imminent and impending, he made statements to Morgan Parker, P. G. Tinsley, and J. T. Monroe, and other witnesses who testified in this case, as to how the difficulty occurred, then it is the duty of the jury to consider and weigh the same, along with the other testimony in the case, in determining the guilt or innocence of the defendant."

Flowers, Alexander & Whitfield, for appellant.

The court decides whether the declaration offered to be proved was made under a realization of impending death. *Owens v. State*, 59 Miss. 547; *Lipscomb v. State*, 75 Miss. 559; *Guest v. State*, 96 Miss. 871.

This question is a preliminary one and should be decided by the court in the absence of the jury. *Lipscomb v. State*, *supra*; *Guest v. State*, *supra*.

Since the proof of the dying declaration is a material part of the case, and since the court decides whether it was made under a solemn sense of impending dissolution, the court should be satisfied beyond a reasonable doubt that the declaration was so made. The accused is entitled to the benefit of the reasonable doubt on questions of fact decided by the court as well as on questions decided by the jury. *Bell v. State*, 72 Miss. 507; *Lipscomb v. State*, 75 Miss. 559; *Guest v. State*, 96 Miss. 871.

It is apparent from the instructions for the state and the defense that the court did not deal with the alleged

dying declarations in the way the law requires. The trial judge did not consider that the question of the competency of the evidence as to the statements made by Dr. Davis was one for him to decide. He would only make such preliminary examination as was necessary to see whether the evidence both as to the condition of the declarant's mind at the time and as to the statements made was sufficient to go to the jury. He submitted to the jury the question as to whether Dr. Davis was under a sense of impending death and without hope at the time the alleged statements were made. This was done by instruction No. 6 for state which is:

“The court charges the jury for the state that the dying declaration is legal testimony, and if they believe beyond a reasonable doubt in this case that shortly before the death of the deceased, and at a time when he was conscious and believing that death was imminent and impending he made statements to Morgan Parker, P. C. Tinsley and J. T. Monroe, and other witnesses who testified in this case, as to how the difficulty occurred, then it is the duty of the jury to consider and weigh the same along with the other testimony in the case in determining the guilt or innocence of the defendant.”

And then he gave instruction No. 6 for the defendant which is:

“The court further instructs the jury that they must be satisfied beyond a reasonable doubt that at the time Dr. Davis made the declaration as testified to by the witness that he had at that time a full realization and solemn sense of impending death and that he had abandoned all hope of life; and the jury must be further satisfied beyond a reasonable doubt that Dr. Davis was sane and rational at the time he made said declarations, and if the jury is so satisfied beyond a reasonable doubt, then you are instructed that you cannot consider any part of said declarations, except that part pertaining to

the killing, and the circumstances immediately attending it and forming a part of the transaction at the time.”

We call the court's attention here to these two instructions as furnishing an explanation of the action of the court in admitting the statements made to Monroe, Harper and Tinsley. The court did not proceed upon the theory that it was his duty to determine finally these preliminary questions. If he did so act, why submit the same questions to the jury? It is not for the jury to say whether the man was conscious of approaching death and without hope. With this issue the jury has nothing to do. *McDaniel v. State*, 8 S. & M. 401; *Nelms v. State*, 13 S. & M. 500; *Lipscomb v. State*, *supra*.

The second important error committed in the trial court which in our judgment calls for a reversal of the judgment of conviction is that the Hon. A. M. Byrd, who made the closing argument for the state commented indirectly upon the failure of the defendant to testify.

Our legislature, deeming that the right of the defendant to testify in his own behalf or decline to testify should be protected, undertook to write such safe-guard into the statute. Section 1918 of the Code is as follows: “The accused shall be a competent witness for himself in any prosecution for crime against him; but the failure of the accused, in any case, to testify shall not operate to his prejudice or be commented on by counsel.”

In the face of this statutory provision prosecuting attorneys will not directly and expressly comment upon the failure of the defendant on trial to take the stand in his own behalf. Such comments these days are always indirect. The statute is sought to be evaded by the use of expressions which may produce the desired effect and yet not be condemned. The comment in the case at bar is indirect and adroit. The able attorney who made the closing argument in behalf of the home man and in the prosecution of the stranger did not say:

“The defendant has not taken the stand to testify; he is afraid to do it; he cannot face the jury and tell how the thing happened without convicting himself; if he knew he was innocent he would not keep the jury in the dark about it but would give them the benefit of whatever information he may have.”

Nothing as direct and palpable as this was done or said.

But one of the attorneys for the defense having stated to the jury that if Gurley had died from his wounds and Davis had recovered, the latter would be on trial for his life and the learned prosecuting attorney seized upon this remark and proceeded to draw a contrast between the conduct of Gurley in the trial and the supposed conduct of Dr. Davis if he had been on trial.

We may take the language of the presiding judge upon which he acted in overruling the motion for a new trial. See page 395 of the record where the following statement by the court is found:

“The court recollects the matters referred to in the testimony, and was watching the arguments of counsel very close, and I recollect the defendant’s counsel had commented on the fact that if Dr. Davis had gotten well and defendant had died, that Dr. Davis would have been on trial perhaps instead of the defendant on a similar charge, and that counsel for state, Mr. Byrd, in alluding to that, quoted from counsel for the defendant in substance and said, ‘if that was true, he would have put Blankenship and other witnesses up and Dr. Davis would have mounted the stand and told how that occurred,’ this statement being objected to, the court promptly sustained the objection and instructed the jury not to regard it, and the court also instructed the jury not to regard any statement as to the defendant not testifying, and I will also state that the instructions asked for by the defendant on that line on that point were given prior to the opening of the arguments of counsel and those instructions were read by counsel for the de-

fendant to the jury and they were fully informed thereby by defendant's request, no prejudice could result from the defendant's failure to testify."

This is a statement by the court as to what he heard the prosecuting attorney say in his closing argument. This statement of fact touching the incident is that upon which the court acted in holding that no harm was done and in overruling the motion for a new trial.

This remark of counsel as understood by the presiding judge amounted to saying that, "Dr. Davis, if he were on trial, would mount the stand and tell this jury how it happened. He would not do as this defendant has done, keep his mouth closed and refuse to tell the jury how the thing happened."

This remark held up to the jury the failure of Gurley to testify. It suggested to the jury that Gurley should be condemned for his failure to testify. The other man, if he were on trial, would be more frank, and less afraid of a full disclosure, ready to give the jury the benefit of all he knew about it. Nothing could be plainer than that this was indeed a comment upon the failure of the defendant to take the stand in his own behalf. The statute contemplates that the silence of the defendant shall not be called to the attention of the jury in the argument for the state. *Sanders v. State*, 73 Miss. 444; *Reddick v. State*, 16 So. Rep. 490; *Drane v. State*, 92 Miss. 180, 45 So. 149.

Claude Clayton, assistant attorney-general, for appellee.

This brings me to a consideration of a material and vital proposition of law as to the admission of these declarations in evidence, and while I admit that it is always necessary to lay a foundation for the introduction of dying declarations on the trial of an indictment for murder by first proving that they were made under a sense of impending death, yet this is a fact, and can be proven and established in any of the accepted ways of

establishing a fact. It may be proven by the express words of the deceased, that he knows that he is bound to die, or there may not be any direct expressions by the declarant that he has abandoned all hope of recovery, as by proving this fact by his conduct and condition, the facts and circumstances which surround him that will reasonably satisfy the court that the declarations were made in extremis, and that he was at the time of making these declarations conscious of his approaching death.

The profession of deceased, his skill as a surgeon, his knowledge of gunshot wounds, his knowledge of the fatality caused by the perforation of the abdominal organs his actions and utterances, with reference to the preparation of his business affairs, his consideration of his family, then dependent upon him, the collection of his insurance policy, and the disposition of his estate, all are potent factors in establishing the condition of his mind at the time when he detailed the particulars of the difficulty. In support of this contention, I refer the court to 21 Cyc. 982, section 9, and from this authority it is shown that it is the universal and accepted rule in almost every state in the Union, and in England, and Canada. Our supreme court has adopted this rule as to the establishment of the condition of the mind of the declarant in the case of *Lipscomb v. State*, 75 Miss. 529, 23 So. 210; *Bell v. State*, 72 Miss. 509, 17 So. 232; *Dillard v. State*, 58 Miss. 368; *McDaniel v. State*, 8 Smedes and Marshall 401, 47 Am. Dec. 93.

It is contended by counsel for appellant that the remarks made by Judge Byrd in his closing argument was a comment upon the failure of the accused to testify. I am frank to admit that if it was a comment upon the failure of the accused to testify, it would be reversible error, but I do not concede that it was even remotely a comment upon the failure of the accused to testify. In order that the court may know exactly about this point, I will quote exactly from the record what Mr. J. W.

Wadsworth stated as being the exact language used by Judge Byrd in his closing argument, to-wit: "Yes, and if Dr. Davis were on trial for the murder of this defendant, he would have mounted the stand and told how this death happened and would have been acquitted."

Mr. Byrd says that he used the following language: "Mr. Wadsworth in his speech had stated that if Gurley had died, and Dr. Davis had lived, perhaps he would have been on trial for the murder of Dr. Gurley, and in reply to this remark of counsel for the defense, I said in substance: 'Gentlemen of the jury, my friend Mr. Wadsworth says that if Gurley had died instead of Dr. Davis, then Dr. Davis would have likely been on trial for this offense.' I then said, 'Yes, that may be true, and if it were, then he would put Blankenship and the other state witnesses on the stand, and instead of speaking himself by a dying declaration he would have mounted the stand, and told you how that difficulty occurred.' "

The testimony of the court, I shall not quote, but from his interpretation, being present at the time, of what was said by Mr. Byrd, in response to the comment of counsel for the defendant was not a comment upon the failure of the accused to testify, but was wholly circumscribed by the bounds of legitimate argument that should be accorded to counsel and especially so when it was made in response to the proposition laid down by counsel for defendant who had just preceded Judge Byrd.

The presiding judge at this trial, in order to be absolutely and unerringly correct about the matter, promptly excluded this remark and it was not a comment upon the failure of the accused to testify.

Argued orally by *J. N. Flowers*, for appellant.

Argued orally by *Claude Clayton*, assistant-attorney general for state.

McLEAN, J., delivered the opinion of the court.

The appellant was indicted for murder, convicted of manslaughter, and sentenced to the penitentiary. The appellant was an employee of the Deemer Lumber Company, and one Dr. Davis was the surgeon or physician of the company. It was the rule or custom of the company to deduct from the wages of its employees the sum that might be due its surgeon. The appellant was indebted to Dr. Davis in the sum of ten dollars, and the lumber company held up the payment of this sum of money for the purpose of permitting the settlement between its surgeon and the appellant as to what was due Dr. Davis. This seemed to be the cause or origin of the difficulty. As to what occurred immediately before and just at the time of the killing, which terminated in the appellant shooting Dr. Davis and Dr. Davis shooting appellant, the evidence is conflicting. In view of the fact that the case is to be reversed, we do not deem it proper to express any opinion one way or the other upon this evidence.

In order to support the theory of the state as to what occurred at the time of the fatal encounter, the dying declarations of Dr. Davis were admitted in evidence. As stated, and as argued by counsel for both the state and the appellant, the case hinges on the question: (1) Whether or not the dying declarations were admissible (this may be termed "a dying declaration case"); (2) The reference of counsel for the state, in his closing argument, to the failure of the defendant to testify. It is altogether unnecessary for us to consider the action of the court below relative to the dying declarations, or as to any of the instructions which were given or refused, except to say that instruction No. 6, given for the state (which the reporter will copy in full), should not have been given. As to whether this instruction, standing alone, would be sufficient to reverse the case, it is not now necessary to decide.

The competency of dying declarations is exclusively for the consideration of the court. Having once decided that it is competent, that the party was of the frame of mind required by the law to authorize the admission of his dying declarations, the power of the court over that question is at an end.

It then becomes the province of the jury to decide upon the credibility, who are at liberty, in doing so, to take into consideration all the circumstances under which the declarations were made, including those already proved to the court, and to give to the evidence only such credit or force as, upon the whole, they might think it deserves. But, when the court has once passed upon the competency of the evidence, its duty then ends. As was said by this court in *Thompson v. State*, 73 Miss. 584, 19 South. 204: "We have never perceived upon what principle the trial courts have acted in singling out particular portions of the evidence in a cause, and telling the jury that it ought or might consider this, that, or another part of the evidence, in connection with the other evidence in reaching a verdict. By admitting the evidence the court has declared its competency, and the jury should be left to its function of determining the weight and effect to be given to it."

Careful, protracted, and repeated examinations of the voluminous record have satisfied us that there is reversible error relative to the argument made by the prosecuting counsel. During the closing argument of the counsel representing the state, the counsel referred to the failure of the defendant to testify. There is some controversy between the counsel for the state and counsel for the defendant as to just exactly what this statement was. The court, however, puts in the record what his recollection of this was, and we are bound to accept the statement of the court as being the true and correct interpretation and language of counsel.

The record shows this: "The court recollects the matters referred to in the testimony, and was watching

the arguments of counsel very close; and I recollect that defendant's counsel had commented on the fact that, if Dr. Davis had gotten well and defendant had died, Dr. Davis would have been on trial, perhaps, instead of the defendant, on a similar charge, and that counsel for the state, Mr. Byrd, in alluding to that, quoted from counsel for the defendant and said: 'If that was true, he would have put Blankenship and other witnesses up, and Dr. Davis would have mounted the stand and told how that occurred.' This statement being objected to, the court promptly sustained the objection and instructed the jury not to regard it; and the court also instructed the jury not to regard any statement as to the defendant not testifying. And I will also state that the instructions asked for by the defendant on that point were given prior to the opening of the arguments by counsel, and those instructions were read by counsel for the defendant to the jury, and they were fully informed thereby, by defendant's counsel, that no prejudice could result from the defendant's failure to testify."

It is urgently and forcefully insisted by appellant that this was error, and reversible error. It must be borne in mind that, in the altercation between Dr. Davis and the defendant, both were shot, that there was a conflict in the evidence of the eyewitnesses as to what occurred at the time of the shooting, and that the dying declarations of Dr. Davis were material—in fact, the dying declarations constituted perhaps the most important and material part of the evidence for the state. Section 1918 of the Code provides that: "The accused shall be a competent witness for himself in any prosecution for crime against him; but the failure of the accused in any case to testify shall not operate to his prejudice or be commented on by counsel." This court, in *Yarbrough v. State*, 70 Miss. 593, 12 South. 551, in condemning any reference whatever by the prosecution for the failure of the defendant to testify, says that: "The word 'com-

ment,' as employed in the statute, does not mean to criticize or condemn or anathematize the accused for his failure to testify. It forbids in unmistakable language any comment, friendly or unfriendly. It forbids any remark of any character in any words upon the failure of the accused to testify. The attention of the jury is not to be called to the fact at all by counsel''—and for the reason, alone, that comment was made by the counsel upon the failure of the defendant to testify, a new trial was granted.

In *Reddick v. State*, 72 Miss. 1008, 16 South. 490, the question was again before this court, and in that case this court says: "The counsel for the state himself admits that, referring to the alleged admission made by the prisoner to the state's witness Swayze, he used this language, viz.: 'And he has not denied it.' He further admits that when the prisoner's counsel interrupted him, suggesting the impropriety of his comment, he corrected himself, and said: 'It has not been denied.' The counsel making the comment, on the hearing of a motion for a new trial, testified that it was not his intention to refer to the fact that the defendant failed to take the stand in his own behalf; but his intention was immaterial, if in fact he used such language as could be reasonably construed to be a comment, and an unfriendly one, too, upon the failure of the accused to testify. The court below so construed the remark. We so construe it, and the jury without doubt so understood it. It is true that, immediately on the prisoner's counsel excepting to the language of the counsel for the state, the court instructed the jury that the district attorney was prohibited from commenting on the defendant's failure to take the stand in his own behalf, and that the jury must not consider any such comment. But this action of the court could not and did not undo the wrong already done. The statute forbids absolutely any comment on the failure of the accused to testify, and it is the right

of every person charged with crime to insist that he enjoy this statutory immunity from criticism by hostile counsel; and the disregard of this plain statute, and the decisions of this court upon it, by the state's own counsel must reverse the judgment appealed from in this case"—referring to *Yarbrough v. State*, 70 Miss. 593, 12 South. 551.

In *Sanders v. State*, 73 Miss. 444, 18 South. 541, this question was again before the court, and for the third time this court, in the most positive language, condemned any reference whatever by counsel for the state to the failure of the defendant to testify, and on that ground alone reversed the case. In this latter case the court said: "It is true the court promptly rebuked counsel, and directed the jury to disregard the fact alluded to, and counsel then asked that his remarks be considered as withdrawn; but the court, for the second time, held that this did not cure the error." In *Boyd v. State*, 84 Miss. 414, 36 South. 525, this court held that it was reversible error for the state to prove upon the trial in the circuit court that the defendant did not testify before the justice of the peace who conducted the preliminary investigation.

No ingenuity, however artful, no subtlety, however refined, can escape the conclusion that this statement made by the prosecuting counsel held up to the jury the failure of the defendant to testify. It was a thrust, sharp and incisive as a rapier, at the appellant that he should be condemned for his failure to testify. If the other man, Dr. Davis, were on trial, he would be more frank, and not be afraid of a full disclosure; but this defendant was afraid of a full disclosure, and hence dared not testify. This was the necessary and inevitable effect produced upon the mind of the jury. If prosecuting counsel expect this court to punish violators of the law, they themselves must obey the law, the plain and positive requirements of the statute. In their zeal and earn-

estness to secure convictions they must confine themselves to legitimate argument, such, at least, as has not been expressly prohibited by the legislature, and also condemned by the court of last resort.

For this error the judgment is reversed.

Reversed.

MARY ANN COMANS v. IOLA TAPLEY ET AL.

[57 South. 567.]

1. JUDGMENT. *Recitals. Conclusiveness. Abatement and Revival. Final decree. Interlocutory decree.*

In the absence of evidence to the contrary a recital in a decree that a party was defendant in the suit is conclusive of that fact.

2. FINAL DECREE. *Interlocutory decree.*

An interlocutory decree is one made pending the cause, and before a final hearing on the merits. A final decree is one which disposes of the cause, either by sending it out of the court, before a hearing is had on the merits, or after a hearing on the merits decreeing either in favor of or against the prayer of the bill.

3. ABATEMENT AND REVIVAL. *Time for Revival.*

A decree in a suit to cancel a sale by a mortgagee in possession and a sale by him as administrator of the purchaser and for an accounting, which cancels the sale, orders an accounting, appoints a commissioner to take an accounting, and reserves other questions until the coming in of the report of the commissioner, is not a final decree from which an appeal should have been taken within the time limited by the statute, so that a failure to appeal would bar a right to revive the action after the death of the parties thereto, but was an interlocutory decree.

4. ON SUGGESTION OF ERROR. *Laches. Delay. Equity.*

Laches in legal significance is not mere delay, but delay that works a disadvantage to another. So long as parties are in the

same condition, it matters little whether one presses a right promptly or not, within the limits allowed by law, but when a party, knowing his rights, neglects to enforce them until the condition of the other party has in good faith become so changed that he cannot be restored to his former state, if the right be then enforced, delay in such case becomes inequitable and operates as an estoppel against the assertion of the right.

5. EQUITY. *Stale claims. Enforcement.*

A claim is stale in equity and will not be enforced where a bill is filed to amend and enforce a decree rendered forty years before and when it is doubtful whether the different parties affected can now obtain the evidence necessary to a fair presentation of the case on their part, and when the land the subject of controversy has passed for value into the hands of an innocent third party, who had constructive, but no actual knowledge that such suit was pending and who was not in fact guilty of any negligence in not obtaining this knowledge, and where such innocent purchases would be greatly damaged without any powers in the courts to grant her any adequate compensation therefor, and where all of this would have been avoided, had reasonable diligence been exercised by complainants to bring the case to a final determination.

APPEAL from the chancery court of Hinds county.

HON. G. G. LYELL, Chancellor.

Bill by Mary Ann Comans et al. against Iola Tapley et al. to revive a suit. From a decree denying relief, complainants appeal.

The facts are fully stated in the opinion of the court.

Allen Thompson and *Lamar Easterling* for appellant, filed an elaborate brief too long for publication, in which they contend that this case was a pending suit; that no statutes of limitations ran against its prosecution. that the decree rendered some forty years ago in the chancery court was not a final decree but an interlocutory decree and that Appellant was not guilty of such laches as would estop them from the prosecution of this suit. Citing *Repass v. Moore*, 30 S. W. (Va.) 458; *Cock v. Gilpin*, 1st Rob. (Va.) 28; *Rawlings v. Rawlings*, 75 Va.

76; *Germania Fire Ins. Co. v. John R. Francis*, 52, 465; *Story Equity Pleading*, 418; 19 Am. & Eng. (2 Ed.) 258; 21 Ky. L. Rep. 751; *Hemphill v. McLimins*, 24 Penn. St. 367; *King v. State Bank*, 13 Ark. 269; *Ballew v. Wilmont*, 5 Kan. Lr. 724; *Railroad v. Jenkins*, 103 Ill. 588; *Tucker v. Wilson*, 68 Miss. 683; *Mantel v. Specific Min. Co.*, 27 Montana 473; *Mill Co. v. Sugg*, 169, 130; *Rich v. Allender*, 26 S. E. 437; *Rowan v. Chenoworth*, 38 S. E. 544; *Shelton v. Armstead*, 7 Grat. 264; *Bacon v. Gordon*, 1 "C" 6, (Miss.) 49; *Allen v. Mandaville*, 4 "C" 397, Miss.; *Richard v. Scott*, 32 Am. D. 779; *Inhabitants v. Buson*, 52 Am. Dec. 618; *Smith v. Cunningham*, 30 So. 652; *Evans v. Sprengen*, 62 Am. D. 105; *Bonner v. Bron- don*, 75 Am. D. 655; *Beasly v. Howell*, 117 Ala. 490, 22 So. 989; *Ingerson v. Lewis*, 51 Am. Dec. —; *Morrison v. Harding*, 81 Miss. 583, 33 So. 80; *Westbrooks v. Mun- ger*, 61 Miss. 329; *Taylor v. Chickasaw Co.*, 70 Miss. 87; *Hill v. Nash*, 73 Miss. 849.

Green & Green, for appellees, filed an elaborate brief too long for publication in which they contend that the original decree filed in this case was a final decree; that the statutes of limitations ran against its further prose- cution and that appellants were guilty of such laches as should estop them from further prosecution of this suit. Section 3110, Code of 1906; Section 2669, Code of 1880; Section 2737, Code of 1892; Section 3097, Code of 1896; Section 3092, Code of 1906; *McKinley v. Irvine*, 13 Ala. 681; *Cochrane v. Miller*, 74 Ala. 51; *Adams v. Sayre*, 76 Ala. 509, 510, 517; *Story v. Hawkins*, 8 Dana (Ky.) 13; *Mills v. Hoag*, 31 Am. Dec. (N. Y.) 271; *Stovall v. Banks*, 10 Wall. 587; *Beebe v. Russell*, 19 How. U. S. 285; *Coithe v. Crane*, 1 Barb. Ch. 23; *Younkin v. Youn- kin*, 44 Neb. 729; *Royal v. Johnston*, 1 Rand. 421; *Dick v. Robinson*, 19 W. Va. 159; *Rhodes v. Williams*, 12 Nev. 20; *McGowan v. Bellamy*, 2 Bibb. 441; *Humphreys v. Stafford*, 71 Miss. 135; *Cocke's Adm'r v. Gilkin*, 1 Rob.

20; *Peterson v. Naun*, 83 N. C. 118; *Magee v. Magee*, 37 Miss. 138, 152; *Niles v. Davis*, 60 Miss. 750; *Nelson v. Ratliff*, 72 Miss. 656; *Ralph v. Prester*, 28 Miss. 744, 752; *Weir v. Field*, 67 Miss. 292; *Street v. Smith*, 85 Miss. 359; *Berkson v. Coen*, 71 Miss. 650; *Insurance Co. v. Francis*, 52 Id. 457; *Myer v. Whitfield*, 62 Id. 387; and *Kelley v. Harrison*, 69 Id., 856; *Tuter v. Brown*, 74 Miss. 774; *Garrett v. Ellis*, MS.; *Westbrook v. Hawkins*, 59 Miss. 499; 1 Greenlief's Evidence, (9 Ed.), sec. 45; Story's Eq. Pl., sec. 429-432, 3 Dan'l Ch. Pl. & Pr., page 1689-1694; *Tell v. Donahoe*, 230 Ill. 476, 82 N. E. 844; *Lancaster v. Snow*, 184 Ill. 534, 58 N. E. 813; *Martin v. Gilleylen*, 70 Miss. 324; *Keel v. Jones*, 93 Miss. 244; *Perkins v. Swank*, 43 Miss. 349; *Tucker v. Wilson*, 68 Miss. 693; *Dickerson v. Thomas*, 68 Miss. 156.

Argued orally by *Allen Thompson* and *Lamar Easterling*, for appellant, and by *M. Green*, for appellee.

WHITFIELD, C.

A statement of the facts of this case is necessary to an intelligent comprehension of the opinion of the court in deciding it. The facts which we deem it essential to state are as follows:

About the year 1842, one Norman Baldwin was the owner of a residence lot in South Jackson, on which he resided with his wife, Mary Ann, until about the year 1845, when he went West on a trading expedition. Before leaving, he carried his wife and children to Holmes county, and left them in the care of her people. Baldwin never returned, but died some time later in Texas, as his wife learned. About the year 1849 Mary Ann Baldwin, his widow, married Daniel Comans. Comans was afterwards appointed administrator of the estate of Baldwin, and instituted the proceedings in the original suit, which suit is, by the present bill, sought to be revived. Baldwin and his wife had three children, Nor-

manda, who married E. A. Smith, Mary Lavinia, who married John Byrne, and William B., who died a minor without issue. Comans, as administrator, filed a report in the probate court in 1858, exhibit A to the bill of revivor herein, in which he states that he took out letters of administration for the sole purpose of recovering the residence house and lot owned by Baldwin. On May 17, 1858, Comans filed a suit in the superior court of chancery against E. M. Avery and T. S. Tapley, the husband of Martha C. Tapley; and on December 2, 1858, an amended bill was filed, by which it seems certain new parties were introduced. The case was then transferred to the chancery court, first district, of Hinds county. The said case was submitted on bill, amended bill, answer, exhibits, and proofs, and was taken under advisement by the court, and at the May term, 1868, the court rendered a decree, which is as follows:

“This cause having been submitted on a former term, on bill, amended bill, exhibits, answers, and proofs, and the court now being sufficiently advised, and because it appearing that Norman Baldwin, deceased, in his lifetime was seized and possessed of a certain town lot in the city of Jackson, Mississippi, known at lot 13, south, and that on the 22d day of October, 1845, he borrowed from defendant Avery the sum of four hundred dollars, and executed his note for the same due 1st of April, 1846, and also a mortgage on said house and lot to secure the payment of said note, said mortgage being dated on the 22d of October, 1845; that said Baldwin went on a trading expedition to the states of Texas, Arkansas, and California, and during the time of his absence departed this life, leaving a wife, who afterwards married the plaintiff, Comans, and the children named in the bill in this cause, to-wit, Lavinia, William, and Normanda Baldwin, all of them minors, etc., represented by said Daniel Comans in said bill; that since the filing of said bill said Willie has died, and the said Lavinia

has married one John Burns, and the said Normanda has married one E. A. Smith, both of said husbands having been made parties by the amended bill; that during the absence of said Norman Baldwin said defendant Avery took possession of said land and lot, rented the same, received large sums for said rent, which he has appropriated, as he claims, to the payment of said note and mortgage, and that after the death of said Norman Baldwin the said Avery sold the said house and lot at public sale without authority of law, and without having administered on his estate and obtained authority to sell the same, and without having taken any steps to foreclose said mortgage, and that at said sale one Thos. A. Isler became purchaser, also that the amount received by said Avery for rent is alleged to have been sufficient to discharge the said note and mortgage, besides what he received from said sale from Thos. A. Isler; that said Isler afterwards died, and said Avery became his administrator, and as such under order of the probate court sold said lot and house to the defendant Martha C. Tapley. And it appearing to the court that the said sales made by the said Avery were null and void, they are therefore so declared, and the court doth order and adjudge and decree that the title to said house and lot, not having been divested by said sales by said Avery, remained in the said Norman Baldwin, and at his death vested in his said widow, now the wife of plaintiff, Comans, and his three children; the said Willie having died a minor, and since the original bill was filed, his interest having descended to his two sisters. It is therefore ordered, adjudged, and decreed that the said sales made by the said Avery are null and void, that the title to said house and lot is in the said widow and children of the said Norman Baldwin, and that an account shall be taken of all moneys received by the said Avery for rent of said house and lot at any and all times, and what was a reasonable rent for the same during

the time, how much was expended by him, and what was a reasonable amount to be expended in necessary repairs on said building, what sums were received by him from the sale of said house and lot, when made by him, what amount was due on said note and mortgage of said Norman Baldwin, due said Avery at the date of sale made by him of said house and lot to said Isler as stated in his answer; That George A. Smythe be appointed commissioner to take and state such account with all due and convenient speed, giving to the defendants or their solicitors of record notice of the time and place of taking said account, and that he report the same to the court; that in taking said account he may refer to the pleadings and proofs on file in this office, and call witnesses before him, and send up their testimony with his report, and all other questions are reserved until the coming in of said report."

Smythe, the commissioner, took no steps toward making the account, and filed no report. It would seem that the late Judge Wharton, counsel for Comans, wrote him a letter on November 4, 1870, saying that he had previously written him that the case had been decided in favor of the heirs of Baldwin, and the court had appointed Mr. Smythe to state an account, etc.; but he did not know whether Mr. Smythe would take the account unless paid in advance. About this time, 1870, Comans seems to have been murdered. Nothing further is shown to have ever been done in the original suit, filed by Daniel Comans, administrator, from the date of the decree, May 1868, until the filing of this bill on the 29th day of December, 1908. In the meantime Commissioner Smythe died, and no other was appointed. In other words, neither the complainants nor the defendants in said original suit have taken any steps to bring that litigation to a close, from the date of the said decree, until the filing of this present bill of revivor. Mrs. Martha C. Tapley, recited by the decree to be a defendant, was

in possession of this property in 1858, when the original suit was filed, and continued in possession during the progress of the trial and until the time of her death in 1897, and after that her heirs at law continued in possession of said property until 1900, when the property was sold for division of the proceeds among said heirs, and was purchased by Mrs. S. S. Brame, and the said property was afterwards conveyed by Mrs. S. S. Brame by a special warranty deed, October 25, 1902, to Miss Iola Tapley, a daughter of Chas. P. Tapley, one of the parties to said partition suit, and a son of Mrs. Martha C. Tapley, defendant in the original suit here sought to be revived.

The only defense set up by the defendants is adverse possession and various other statutes of limitation. But there is nothing in any of the these contentions, unless the case is saved for them by adverse possession for the time required by law to confer title. The prayer of the bill in this present case is that said original suit be revived, a new commissioner appointed, and the cause proceeded with. The original decree, made at the May term, 1868, above set out in full, shows all the material facts as to the dealing with this property by Avery, and how Mrs. Martha C. Tapley came into possession. A most material part of the testimony in respect to the claim set up that the defendants had adverse possession is the testimony of Mrs. Comans, the wife of Daniel Comans, and the testimony of Mrs. Normanda Constanta Smith, in which they both positively testify that some twenty years before the taking of their depositions, which seem to have been done some time in May or June, 1910, Mr. Chas. P. Tapley, the son of Mrs. Martha C. Tapley, went from Jackson to the home of Mrs. Comans, who appears to have been about 86 years old at the time of the taking of the depositions, in Neshoba county, Mississippi, where she lived at the time of the taking of these depositions. It appears that Mrs.

Comans remained about five or six years in Holmes county with her people, and then went to this place in Neshoba county. It appears that this home of Mrs. Comans in Neshoba county was, at the time of the visit of Tapley, about twenty-five miles from any railroad. Mrs. Smith seems to have lived in Neshoba county, about one mile from her mother, Mrs. Comans. The testimony of Mrs. Comans and Mrs. Smith is to this effect: That Chas. P. Tapley and a Mr. Hatcher came to Mrs. Comans' house for the sole purpose of buying this property, and that Mr. Tapley told Mrs. Comans, that his (Tapley's) mother was a poor woman, and that his mother would give Mrs. Comans thirteen hundred dollars or fourteen hundred dollars for this property in Jackson, but that Mrs. Comans declined to take less than two thousand dollars, saying, however, that she would come over to Jackson before long to see about it; that Tapley left, and they never saw him or heard from him any more. They further testified that the sole business of Tapley at Mrs. Comans' house on that occasion, where he stayed just a little while, was to make this offer to buy this property. It is due to Tapley to state that he denies that he had any conversation with Mrs. Comans on the subject. He states that he and Mr. Reese Hatcher, a neighbor, did go to Neshoba county about 1872 or 1873; but he states that he did not go to see Mrs. Comans at all, and never had a conversation with her in his life. Hatcher is dead. Chas. P. Tapley further testifies that his mother was generally recognized as the owner, and that he never heard of any claim otherwise, except that Judge Wharton, who it will be remembered was the counsel for Comans in the original suit, said to a cousin of Tapley's Mr. Dick Hardy, in 1868, that he (Judge Wharton) could "take the property," and that this remark was repeated to his mother, but that he (Tapley) paid no attention to the remark.

The object of appellants in introducing the testimony of Mrs. Comans and Mrs. Smith was to show a permis-

sive holding and knowledge on the part of Mrs. Martha C. Tapley that the property belonged to the Comans heirs. In our view of the case, however, it does not become material to discuss this testimony further. It is merely stated as a part of the history of the case. We regard this case as turning solely upon the answer to the question whether the original suit filed by Daniel Comans, in which the decree was rendered at the May term, 1868, is still a pending suit. If it is a pending suit, then, of course, no plea of adverse possession can avail, and the possession, though continued from 1868 until the institution of this suit in 1908, affords no protection to the defendants. It is certainly a most extraordinary fact that no steps were taken by either the complainants or the defendants in this original suit for such an unusual length of time. But it was as much the duty of the defendants as the duty of the complainants to have that suit proceeded with and ended, and our only duty is to declare the law governing the case, having nothing to do with the consequences.

Courts cannot afford, on account of the hardships of cases, to announce bad law. All persons are charged with a knowledge of the law, and it was the duty of both complainants and the defendants to have seen that this litigation was prosecuted to a conclusion and definitely terminated. Either party could have moved in the cause, and set the machinery of law in action, and had their respective rights determined, and all the equities of the original cause, as to the debt to Avery, and whether it was paid or overpaid, and as to the rents that were collected, and as to the amounts necessarily expended in repairs and improvements, and as to any sums that may have been paid by way of purchase money definitely adjudicated, very soon after the decree of May, 1868. It is the fault, not of the law, but of the parties, that this was not done.

Coming, then, to the determining question in the case, let us note what this decree did, and required to be done.

In the first place, it canceled the sales from Avery to Isler, and from Avery, administrator of Isler's estate, to Martha C. Tapley, and declared them to be null and void. In the second place, it declared an accounting between the parties essential to the proper settlement of the various equities existing between them. It directed the commissioner to take said account, covering all the equities which we have above mentioned, and to report its action to the court. In the third place, the court expressly in the decree reserved all the other questions until the coming in of the commissioner's report. In the fourth place, there was no decree for costs, a matter not in itself determinative, but to be noted carefully. Mrs. Martha C. Tapley, in the settlement of the equities, would certainly have been entitled to be subrogated to the extent of the four hundred dollars due by Baldwin to Avery, and secured by the mortgage and the interest thereon, and she would also be entitled to the amount of any improvements made by her, and all taxes paid by her, and she would be liable to account for the amount of the rent of said property received by her, during the whole period of her possession. It is impossible to see how an intelligent final decree could have been rendered in the case until the coming in and consideration and settlement of the commissioner's report.

One point should just here be disposed of. It is earnestly insisted by appellees that Mrs. Martha C. Tapley never was a defendant to this original bill filed by Comans, and it is stated with earnestness that the answer denies under oath that she ever was such a party. So far as this last point is concerned, however, we have answer under oath expressly waived, and there is not a particle of testimony in the case to show that Mrs. Martha C. Tapley was not a party defendant to that suit. On the other hand, the said decree at the May term, 1868, expressly recites on its face that Mrs. Martha C. Tapley was a defendant. In the absence of evidence to

the contrary, this solemn recital in the decree is conclusive that she was a party defendant to that suit. In the case of *Germania Fire Insurance Company v. Francis*, 52 Miss. 457, 24 Am. Rep. 674, it was expressly held that a technical discontinuance of a suit, as known at common law, has been abrogated by our statutes, and does not here exist. We think that the principle announced in the case of *Tucker v. Wilson*, 68 Miss. 693, 9 South, 898, controls this case. That opinion was so clear and directly in point, that we set it out in full. It is as follows:

“The suit begun by the complainants in 1870 was not abated by the death of the next friend by whom they sued, nor by the fact that the complainants attained their majority after suit brought. There was no necessity for a bill of revivor. All that was required was for them to appear in the suit as adults and prosecute it. The paper exhibited by them as a bill of revivor was a very proper mode of bringing to the notice of the court their wish to appear in their own behalf as adults, and continue the suit begun in their behalf by their next friend, and it was fit that the defendants should be aroused from their long sleep, be advised of the purpose of complainants, and notified to answer the original bill, as ordered by the supreme court. The suit has been a pending suit all the time, as between the parties to it certainly, and is to be proceeded with as if a long time had not elapsed, and because of this no statute of limitations is applicable, I Dan. Ch. Pl. & Pr. pp. 77, 78. The sale of the land by the trustee, and its purchase by the defendant, made no change in the rights of parties. Mrs. Wilson, as a party, was bound to know that the blunder by which case No. 636 was dismissed did not in any manner affect the real case, No. 564, which was properly before the supreme court, and was disposed of by it by reversing the decree, overruling the demurrer, and requiring an answer in forty days. If a stranger to the

record should claim to have been misled by the mandate sent out after the dismissal mentioned, she could not. The suit brought by the complainants in Union county, and which upon demurrer was dismissed without prejudice, and the action of ejectment they instituted and dismissed, had no effect whatever on this suit. These fruitless efforts show a want of a proper conception of the right course for the complainants to pursue for their advantage, but do not furnish a reason for precluding them from proceeding in the right way they now discovered and undertook to pursue. The case is to be proceeded with just as if the judgment of this court, rendered March 24, 1873, had been promptly certified to the chancery court of Lee county. Mrs. Wilson will be allowed to answer the original bill, as she might have done eighteen years ago., She might then have paid the costs of this court adjudged against her and codefendants, and have speeded the cause; but, having allowed it to remain in *statu quo* so long, she must now meet the case made by the bill."

There was a lapse of time there of some eighteen years. Of course, length of time is immaterial, if it remains true that the suit has always been pending.

It is further earnestly contended in the very able brief of learned counsel for appellees, however, that the suit is not pending, because, as is said, the decree rendered in May, 1868, was a final decree, and not an interlocutory decree. The argument is that the decree was final in so far as it affected the title, and that the rest of the decree, appointing a commissioner and directing him to state an account as indicated above, so that the equities between the parties might be settled, as also indicated above, though admittedly interlocutory in its character, did not prevent an appeal from that part of the decree finally settling the title to the property. In other words, it is said that a decree may be in part final and in part interlocutory, and that in such case that

part which is final may be appealed from, and that the decree in this case as to title was final, and that part of the decree could have been appealed from, and hence this present bill is barred by the statute of limitations on that subject. We have given a most careful consideration to the authorities cited by the learned counsel on both sides touching this point. The best and clearest statement we have been able to find, is set out in sections 29 and 32 of volume 1 of Freeman on Judgments.

We quote a part of section 29 as follows: "An interlocutory decree is one made 'pending the cause, and before a final hearing on the merits. A final decree is one which disposes of the cause, either by sending it out of the court before a hearing is had on the merits, or after a hearing on the merits, decreeing either in favor of or against the prayer of the bill.' But no order or decree which does not preclude further proceedings in the case in the court below should be considered final. A decree is interlocutory which makes no provision for costs, and in which the right is reserved to the parties to set the cause down for further direction not inconsistent with the decree already made; and so is a decree which contains a provision for a reference of certain matters, and that all further questions and directions be reserved until the coming in of the report of the referee. An order or decree *pro confesso* for an injunction restraining the use of an invention is interlocutory merely; but a decree dismissing a bill, or dissolving an injunction and passing definitely on all the essential points in issue, is final. Interlocutory decrees are entered under an infinite variety of circumstances, and the relief afforded corresponds in variety to the circumstances demanding it. It is therefore difficult, and perhaps impossible, to formulate any classification which will include every order or interlocutory judgment or decree. By far the greater number of those which are at all likely to be mistaken for final judgments or decrees fall within

the following classification: Those which, while they determine the rights of the parties, either in respect to the whole controversy or some branch of it, merely ascertain and settle something without which the court could not proceed to a final adjudication, and the settlement of which is obviously but preliminary to a final judgment or decree.”

We quote as follows from section 32: “Instances of interlocutory decrees of the third class are very numerous. Thus if the suit is for the dissolution of a partnership, and for an accounting and a settlement of the partnership business and the division of its assets, the court may be required to determine whether any partnership existed, and, if so, whether it ought to be dissolved, and what were the respective interests of the several parties before the court therein. The determination of these questions, accompanied with a direction that an account be taken, will not be deemed a final adjudication, unless the decree is so complete that nothing remains to be done except to follow its directions. In suits for partition, the courts must determine the interests of the cotenants, and whether partition shall be made by a sale of the property, or otherwise; but it is not until the confirmation of the partition, whether by sale or allotment, that a final decree exists. A decree that parties account is another familiar instance of a determination preliminary to, but not constituting, a final judgment. A decree declaring that complainant is entitled to have lands sold to pay purchase money or a mortgage debt due him is not final, if a reference is ordered to ascertain what sum remained unpaid. An action was commenced to enforce certain liens against real estate, and a judgment therein was entered, directing that a sale of the premises be made, and that from the proceeds a sum specified should be paid to discharge one of the liens, and that the plaintiff should be paid an additional sum, less the amount due from him to the defendant for

rent of the premises, and that a reference he had to ascertain the amount of such rent. An appeal was taken from this judgment. The appellate court, on motion to dismiss the appeal, considered that as the object of the action was to ascertain to whom the whole proceeds to be derived from a sale of the premises should belong, and as this could not be ascertained until it was known what amount ought to be deducted from the plaintiff's claim for rents, the judgment entered by the court below was not a final judgment. Obviously a decree of foreclosure cannot be final, if it neither determines the amount to be paid nor ascertains or describes the property to be sold, nor if it merely declares the amount due, without awarding to plaintiff the only relief to which he is entitled in the suit, to-wit, a direction or judgment that the property be sold and the proceeds applied to the satisfaction of the mortgage debt. While the question of costs can hardly be regarded as forming a distinct issue in the case, nor its reservation as necessarily preventing a final determination of the rights of the parties, yet in some states a judgment or decree, otherwise final, reserving this question, is treated as interlocutory."

Another most admirable statement of the law on this subject is found in the very able opinion of Baldwin, Justice, in the case of *Cocke's Administrator v. Gilpin*, 40 Va. 20. In the course of that opinion, the court said: "It will be seen from an examination of the numerous decisions of this court on the subject of the finality of decrees, in reference to appeals, bills of review, etc., that they have all been founded upon the idea that a decree is not final unless the cause itself has been thereby terminated in the court below. Thus, though a decree decides upon the question of title, or otherwise settles the principles of the cause (*Young v. Skipwith*, 2 Va. 300; *Grymes v. Pendleton*, 5 Va. 54; *McCall v. Peachy*, 5 Va. 55; *Bowyer v. Lewis*, 11 Va. 553), though it dis-

misses the plaintiff's bill as to one of two separate subjects of controversy, and as to the other also determines the right of the parties (*Templeman v. Steptoe*, 15 Va. 339), though a decree *nisi* directs that the tract of land in the bill mentioned be surveyed and part thereof allotted to the plaintiff, and that the defendant shall execute to him a conveyance for such part, and pay the costs of the suit (*Albridge v. Giles*, 13 Va. 136), though the decree directs the defendant to pay to the plaintiff hires to be ascertained by commissioners, and to deliver up the property, to be sold by the commissioners, and the proceeds applied to payment of the plaintiff's claim and the costs of the suit, and the residue, if any, to be paid to the defendant (*Mackey v. Bell*, 16 Va. 523), though, at the suit of creditors against executors and devisees, it empowers the executors to sell such of the lands held by the devisees as, after application of the testator's goods and credits, shall be necessary for the payment of his debts (*Goodwin v. Miller*, 16 Va. 42), though it awards to the plaintiff his principal money, interest, and costs, if it directs, in the event of an unproductive execution, that certain trust property shall be delivered by the defendant to the marshal to be sold, and the proceeds, after deducting a sum to be deposited for another, to be applied to the satisfaction of the plaintiff (*Hill's Ex'r v. Fox's Adm'r*, 37 Va. 587), though in a mortgage suit it forecloses the mortgage and directs the sale of the property (*Fairfax v. Muse's Ex'rs*, 12 Va. 558; *Ellzey v. Lane's Ex'x*, 12 Va. 592; *Allen v. Belches*, 12 Va. 595), yet in all these cases the decree is only interlocutory, if something yet remains to be done in the cause, and so the parties are not put out of court." And, at page 27, the court lays down this test: "For my own part, I am aware of no proper criterion but this: Where the further action of the court in the cause is necessary to give completely the relief contemplated by the court, there the decree upon which the question arises is to be

regarded, not as final, but interlocutory. I say the further action of the court in the cause to distinguish it from that action of the court which is common to both final and interlocutory decrees, to-wit, those measures which are necessary for the execution of a decree that has been pronounced, and which are properly to be regarded as adopted, not in, but beyond, the cause, and is founded on the decree itself, or mandate of the court, without respect, to the relief to which the party was previously entitled upon the merits of his case. Any other criterion than this seems to be liable to the objection of ambiguity or uncertainty."

And this court held on the concrete case as follows (see syllabus, 40 Va. 20): "In a suit by one partner against his copartner, for a settlement of the partnership accounts, and for a moiety of a tract of land purchased by the defendant in his own name, and paid for out of the partnership funds, a decree having been made declaring the land partnership property, and directing a settlement of the accounts, and the cause afterwards coming on to be further heard upon the report of the commissioner, the court decrees that the plaintiff pay to the defendant the sum of money appearing due by the report, and that the defendant thereupon convey to the plaintiff a moiety of the land; but if the plaintiff shall not, within six months from the date of the decree, pay the said money, that the marshal sell the moiety of the land, and out of the proceeds of sale, after defraying the expenses, pay to the defendant the money so decreed, and the residue, if any, to the plaintiff. And the court further decrees that the outstanding debts due to the firm be equally divided between the parties, and that the cost of the suit be equally borne by them. Held, this decree is interlocutory, and it may be reviewed upon an appeal, although there has been such lapse of time between the rendition of the decree and the appeal as would preclude it being reviewed if the decree was final."

In the light of these decisions, applying the principles therein announced to the said original decree rendered at the May term, 1868, in the suit brought by Daniel Comans, administrator, we are clearly of the opinion that the said decree was not a final, but an interlocutory, decree only.

It follows, from these views, that the contentions of the learned counsel for the appellees cannot be sustained.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the decree of the court below is reversed, and the cause remanded, to be proceeded with in accordance with the said opinion.

ON SUGGESTION OF ERROR.

SMITH, J. We do not think this case is controlled by the case of *Goff v. Robins*, 33 Miss. 153, for the reason that in that case the decree which it was sought to revive, amend, and execute was a final decree, while here the decree which it is sought to amend and execute is an interlocutory decree. After a most thorough consideration, however, of this most extraordinary case, we are of the opinion that we erred in reversing the decree, of the court below, and that the same should be affirmed, on account of the inexcusable delay of appellants in proceeding to obtain the amendment and execution of the decree rendered May, 1868, coupled with the great hardship which would now result to an innocent party, should that decree be now enforced. The power of a court of equity to enforce the doctrine of laches, where the delay is for a period less than the time required by the statute of limitations, is not here involved, for the reason that the longest period of time prescribed by any statute of limitations has four times passed since this decree was rendered.

The doctrine of laches is founded principally upon the equity maxims "He who seeks equity must do equity," "He who comes into equity must come with clean hands," and "The laws serve the vigilant, and not those who sleep over their rights." Its object is to exact of the complainant fair dealing with his adversary. According to Mr. Pomeroy, with whom we fully agree, this doctrine cannot be more concisely and accurately stated than in the language of Stiness, J., in *Chase v. Chase*, 20 R. I. 202, 37 Atl. 804: "Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other part has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but when a court sees negligence on one side and injury therefrom on the other it is a ground for denial of relief." 1 Pomeroy's *Equitable Remedies*, sec. 21, and authorities there cited, particularly *Wilson v. Wilson*, 41 Or. 459, 69 Pac. 923; *Lindsey Petroleum Co. v. Hurd*, L. R. 5, P. C. 221; *Naddo v. Bardon*, 51 Fed. 493, 2 C. C. A. 335; *Ryason v. Duntun*, 164 Ind. 85, 73 N. E. 74; *Neppach v. Jones*, 20 Or. 491, 26 Pac. 569, 849, 23 Am. St. Rep. 145.

In *Wilson v. Wilson*, *supra*, 41 Or. 463, 69 Pac. 924, it was said: "Several conditions may combine to render a claim or demand stale in equity. If by the laches and delay of the complainant it has become doubtful whether adverse parties can command the evidence necessary to a fair presentation of the case on their part, or if it appears that they have been deprived of any such

advantages they might have had if the claim had been seasonably insisted upon, or before it became antiquated, or if they be subjected to any hardship that might have been avoided by reasonably prompt proceedings, a court of equity will not interfere to give relief, but will remain passive. . . . If, however, upon the other hand, it clearly appears that lapse of time has not in fact changed the conditions and relative position of the parties, and that they are not materially impaired, and there are peculiar circumstances entitled to consideration as excusing the delay, the court will not deny the appropriate relief, although a strict and unqualified application of the rule of limitations would seem to require it. Every case is governed chiefly by its own circumstances." In *Lindsey Petroleum Co. v. Hurd*, *supra*, the language of the court, at page 239, was as follows: "Now the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay, of course, not amounting to a bar by any statute of limitations, the validity of that defense must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy." In *Buckner and Stanton v. Calcote*,

28 Miss., at page 596, the court approved the statement by Lord Camden in *Smith v. Clay, Ambler*, 645, that: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, when the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced." As was said by the late Mr. Justice Brewer while on the circuit: "No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resurrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claims. It gives to the actual and longer possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works out justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many." *Naddo v. Bardon*, 53 Fed. 493, 2 C. C. A. 335.

Now, let us see what the conditions are which combine to render the claim of appellants stale in equity. When the present bill was filed in the court below forty years had elapsed since the rendition of the decree which it is now sought to amend and enforce. It is doubtful whether the different parties can now obtain the evidence necessary to a fair presentation of the case on their part. If there be witnesses still living cognizant of the facts originally in dispute, their recollections thereof must now be so imperfect as to forbid the court from relying with confidence thereon. The land has now

passed, for value, into the hands of an innocent third party, who had constructive, but no actual, knowledge that such a suit was pending, and who was not in fact guilty of any negligence in not obtaining this knowledge. Should this suit be now proceeded with, she will be very greatly damaged, without any power in this court to grant her any adequate compensation therefor. All of this would have been avoided, had appellants proceeded with reasonable diligence to bring this case to a final determination. Appellee is in no fault in the matter, for the reason that she was not a party to the cause until the filing of the present bill, and prior to that time knew nothing whatever of it. The conduct of the original parties thereto is consistent only with the theory that the matters in dispute had been settled, or the suit abandoned. We are not unmindful of the fact that in *Taylor v. Chickasaw County*, 70 Miss. 87, 12 South. 210, the claims allowed to be enforced were "very old;" but the views herein expressed are not in conflict with that case, for the reason that the other conditions which here combine with the lapse of time to render appellants' claim stale in equity did not in that case exist.

The suggestion of error is sustained, the judgment heretofore rendered is set aside, and the decree of the court below is affirmed.

Affirmed.

A. M. McKINZIE v. MRS. H. C. FELLOWS.

[57 South. 574.]

APPEAL AND ERROR. *Failure to file transcript. Dismissal. Code of 1906, sections 4902-4906.*

Where a transcript should have been filed in the supreme court on or before the third Monday in January as provided for in Code of 1906, sections 4902-4906 and a motion was made to docket and dismiss the appeal, but the transcript was filed within four days after such motion, the court overruled the motion to docket and dismiss, holding that appellant was not in fault in the matter as had he gotten out a *certiorari* to the clerk to send up the record, and such writ would not have obtained the record much if any sooner than the date on which it was in fact filed in the court.

APPEAL from the chancery court of Jones county.

HON. SAM WHITMAN, Chancellor.

Suit by A. M. McKinzie against Mrs. H. C. Fellows. From a decree for defendant, plaintiff appeals. Motion to docket and dismiss the appeal.

The facts are fully stated in the opinion of the court.

Henry Hilbun and Shannon & Street, for motion.

R. E. Halsell, contra.

SMITH, J., delivered the opinion of the court.

The decree in this case was rendered on the 26th day of April, 1911, and the appeal bond was executed and filed on the 12th day of June, 1911. Under sections 4902 and 4906 of the Code of 1906, the transcript of the record should have been filed in this court on or before the third Monday (15th) of January, 1912. This the clerk of the lower court failed to do, and on the 27th day of January, 1912, this motion to docket and dismiss was filed. Thereafter, on the 31st day of January, 1912, the transcript of the record was filed with the clerk of this

court. The clerk of the lower court had until the third Monday of January, 1912, in which to file the transcript of the record in this court, and appellant could have done nothing to compel him to file it earlier than that date. When he failed to file the transcript of the record on the third Monday of January, appellant could then have moved for a writ of *certiorari* directing him to send up the record; but such a writ would not have obtained the record much, if any, earlier than the date on which it was, in fact, filed in this court.

Consequently appellant was not in fault in the matter, and the motion to docket and dismiss is overruled. See *McAlester v. Richardson*, 57 South. 547, this day decided.

Overruled and dismissed.

J. B. SANDERS v. McALISTER BROS. & Co.

[57 South. 801.]

1. BILLS AND NOTES. *Assignee of bona fide purchaser. Rights.*

Where a party executed his note to a savings bank for the purchase of a certificate of deposit, for an equal amount, drawing a higher rate of interest, and the note was deposited by the savings bank with another bank as security for a debt and the latter bank took it before maturity and without notice of any defense thereto; and after the note matured and the savings bank failed, the other bank attempted to collect the note and there was no notice of a set off made until the other bank sold the note at public auction to plaintiff after maturity, at which sale the maker of the note gave notice of his alleged right to set off his certificate of deposit. *Held*, that plaintiff having acquired the note from the bank which was a holder in good faith, was himself a *bona fide* holder for value, and that the certificate of deposit was, therefore, not available as a set off as against plaintiff's rights.

2. SAME.

If a person give his note for stock in a corporation and the corporation proves a failure, the validity of the note is not affected thereby.

APPEAL from the circuit court of Tippah county.

HON. W. A. ROANE, Judge.

Suit by J. B. Sanders against McAlister Bros. & Co.
From a judgment for defendants, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Sharp & McIntyre & T. E. Pegram, for appellant.

Fraud is never presumed and the burden of proving it rests upon him who asserts it is so well settled that argument is unnecessary. 20 Cyc. 108, 109; Ency. of Evi., Vol. 6-8; *Archer v. Helm*, 70 Miss. 874.

Before a jury could have rendered a verdict in favor of the appellees on the ground of fraud connected with the contract the proof that fraud was perpetrated would have had to be clear, strong and convincing. Wigmore on Evidence, Vol. 6, section 2498; *Chambers v. Meaut*, 66 M. 625; *Insurance Co. v. Farnworth*, 72 M. 555. The evidence in this case in support of the claim of fraud is not sufficient; it doesn't even reach to that height to excite a suspicion of fraud which would not be sufficient. *Shoe Co. v. Davis*, 75 M. 447.

It is a well settled proposition of law that before a trial court is warranted to take a case from the jury on the ground of fraud, that there must have been not only proof of fraud but clear, convincing and uncontradicted proof, such proof as would lead reasonable men to reach but one conclusion, namely that there was fraud practiced in the transaction. 20 Cyc. 123, and foot notes. Even though the alleged false representations may have been uncontradicted, the question as to whether those representations amounted to fraud was a question for the jury, and should have been so submitted. *Anderson v. Bennett*, at page 165.

If the court granted the peremptory instruction for the appellees, defendants in the court below, on the theory of fraudulent inducements to execute the note sued on, it is indeed strange, for the evidence not only fails to reach that degree which would have authorized the court to have taken such a course but there is a total lack of testimony, which would even indicate or hint at fraud. The contracts themselves contain no terms that indicate fraud. It is true that the certificate of deposit designates that interest will be paid thereon at the rate of twelve and one-half per cent. per annum and that the note only provides for eight per cent. per annum. This discrepancy in interest is accounted for, and consideration is given therefor, by reason of the fact that the appellees obligated themselves to their banking business with the Tishomingo Savings Institution. If it should be insisted that this discrepancy is indicative of fraud, did not the appellees have full notice thereof and were they not induced to sign the note on this very feature, doubtless?

The appellees offered no proof whatever that the Tishomingo Savings Institution had no authority to issue the certificate of deposit, nor does such lack of authority appear. It was not a stock certificate, but merely a certificate of deposit, with some additional stipulations, as shown on the face thereof, to strip it of its verbiage, it is simply a promise to pay the depositors the sum of five hundred dollars with interest thereon, with other conditions.

Under the appellees special plea of want of consideration the same burden rests to prove such want. The very certificate of deposit itself shows that there was a consideration for the note, because by this certificate, as before stated, the bank obligated itself to pay to the appellees the said sum of five hundred dollars. Notes exchanged one for the other form a sufficient consideration and it is true also of an exchange, check or bills or of

a note for a letter of credit. In such exchange each note or bill is a separate or independent contract. 7 Cyc. 710; Joyce's Defences to Commercial paper, Sec. 227. A certificate of deposit is a good consideration for a note discounted in a bank. *Miss. R. Co. v. Scott*, 7 Howard 79.

Stephens & Kennedy, for appellees.

The uncontradicted proof in the case is that the Tishomingo Savings Institution ordered these certificates issued and sold to an unsuspecting public at a time when said institution was in a most desperate strait and was using every possible means to secure money and avoid bankruptcy and ultimate ruin, having borrowed all the money it could borrow, it devised this far-fetched plan of getting the people's money without disclosing or even intimating its great financial press and need of funds, being thus embarrassed it not only borrowed all it could on paper bearing ten per cent. per annum, but it actually pretended that the certificate so issued and sold to appellees was represented by a deposit of an amount equal to the face value of said certificate, which was then in its bank to the credit of appellees, agreeing to carry appellees' paper at eight per cent. and at the same time pay them twelve and one-half per cent. on the certificate of deposit so issued and sold to these appellees, is fraud *per se* to say nothing of the shrewd and artful condition contained in the body of the certificate itself, *q. v. Houston's Case*, 56 So. 336; *Loan Co.*, 56 So. 293. We cannot escape the conclusion that the Tishomingo Savings Institution was insolvent, when it issued its certificate to appellees and took their note in payment of the same, never expected to do more than pledge the note and secure funds with which to satisfy its present impending demands. Having done this, no further consideration was ever given the matter, until it along with a number of other notes were sold in St.

Louis, when appellant became the buyer with actual notice of all these outstanding equities, etc., and just how appellant can claim to be an innocent purchaser for value under our anticommercial statute, I am unable to see or understand. Certainly the Tishomingo Savings Institution could not recover on this note if it had brought the suit instead of appellant. Can appellant occupy any better position in a suit to enforce payment of this note than said Institution would have occupied in a similar proceeding? Certainly not, etc.

Whether the consideration failed before or after the transfer, is quite immaterial under the facts in this particular case; one thing certain and that is, these appellees never received any thing for the note sued on and appellant knew this when he bought the note in St. Louis, etc. Of course, it was fraudulent for the Tishomingo Institution to issue certificates like the one issued to appellee, when it was in great financial stress and making every possible twist to save itself from impending ruin, and its paper from going to protest and default in payment, etc. The transaction stated in short is simply this: The Tishomingo Savings Institution agreed with certain parties that it would execute its note for five hundred dollars in favor of any one of them bearing interest at the rate of twelve and one-half per cent, per annum and give it in exchange for their note for like amount, bearing interest at the rate of eight per cent, per annum. The proposition is a query and the answer is a solution to this controversy; motive is the main spring of both thought and action, and just why a business institution, a bank if you please, would offer its paper in exchange for individual paper bearing a much less rate of interest, cannot be answered in truth except by stating that the institution must have been to all intents and purposes insolvent, and fixing to retire from business, etc. If it was at the time insolvent; if it was at the time unable to carry out its obligation with ap-

pellees and concealed this fact from them and induced them in the belief that it was solvent to execute the note sued on, then the note is uncollectible and no recovery can be had in this case. The judgment of the court below was eminently right and proper and should be affirmed here, etc.

MAYES, C. J., delivered the opinion of the court.

The record in this case shows that during the years 1906 and 1907 the Tishomingo Savings Institution was a banking corporation engaged in the banking business and having its domicile at Corinth, Miss. It also appears that this Institution had several branch banks, one of which was located at Ripley, known as the Ripley Branch of the Tishomingo Savings Institution. This Ripley Branch decided to issue certificates of deposit to such persons as would take them, these certificates of deposit to bear interest at the rate of twelve and one-half per cent. per annum. The reason for issuing these certificates of deposit is stated in the record to have been for the purpose of inducing the persons to whom they were issued to conduct their banking business with the branch bank. The following is a copy of the certificate of deposit issued by this branch bank: "No. G. \$500.00. Ripley Branch of the Tishomingo Savings Institution, of Corinth, Miss. This certifies that McAlister Brothers & Co. has placed with the Ripley, Miss., Branch of the Tishomingo Savings Institution the sum of five hundred dollars to be used by the said Institution in its business. The said Tishomingo Savings Institution agrees to pay on said sum twelve and one-half per centum per annum, payable annually. This certificate shall be redeemable at its face value upon surrender to the said Institution at any time after five years from date, hereof, and the said Institution at its election may call in this certificate for payment at its face value and cancellation at any time after one year from the date hereof. This

certificate is nonnegotiable, and is transferable only on the books of said Institution by the holder hereof, in person or by attorney, upon the surrender of this certificate properly indorsed. The holder hereof agrees that he will not sell this certificate without first giving the said Institution an option to purchase the same at its face value within three months prior to the sale. In testimony whereof the said Tishomingo Savings Institution has caused this certificate to be signed by its president, and its corporate seal to be affixed, and to be attested by the manager of its Ripley Branch, this the first day of January, 1907. Tishomingo Savings Institution, by J. W. Taylor, President. [Seal.] Attest: Jno. Y. Murry, Jr., Manager of Ripley Branch."

The legal principles controlling the decision in this case are not affected by the reasons which controlled the Branch Bank in issuing these certificates, and we shall not attempt to pursue the reasons. It is sufficient to state that the Branch Bank issued the certificates, and McAlister Bros. & Co. bought one, and paid for it with their note at eight per cent. and due on January 1, 1908. The note appears in full below. In order to obtain one of these certificates, it was not necessary that the party purchasing it should actually place the money on deposit with the bank, as the certificate stated that he had done; but the bank undertook to exchange these certificates of deposit bearing twelve and one-half per cent. interest for the note of a person for the same amount as the certificate, the note to bear interest at eight per cent. In other words, the bank issued its certificate for five hundred dollars, agreeing to pay the holder twelve and one-half per cent. interest, and in exchange therefor to take a note at eight per cent. The note executed by McAlister Bros. & Co. was as follows: "\$500.00. Corinth, Miss., January 1, 1907. One year after date, we, and each of us, promise to pay to the Tishomingo Savings Institution, of Corinth, Miss., the

sum of five hundred dollars, with interest thereon, from date until paid, at the rate of 8% per annum, payable at the Tishomingo Savings Institution, Corinth, Mississippi, and said interest payable annually, and in case of failure to pay said interest at its maturity, then said interest is to bear interest at the rate of ten per cent, per annum from its maturity till paid, and in case this note is placed in an attorney's hands for collection, we agree to pay ten per cent. on the amount due, for attorney's fees. No. 2139. [Signed] McAlister Bros. & Co. Address, Ripley, Miss. Due, [Merchants]."

After the execution of this note, it was indorsed by the Tishomingo Savings Institution, by J. W. Taylor, President, and about March 5, 1907, was placed as collateral security with the National Bank of Commerce, of St. Louis, for a debt that was owing the National Bank of Commerce by the Tishomingo Savings Institution. Subsequently the National Bank of Commerce of St. Louis indorsed this note to the Ripley Bank or order for collection. The Tishomingo Savings Institution, prior to March 5, 1907, was indebted to the National Bank of Commerce of St. Louis in the sum of about forty thousand dollars, and about the 5th day of March, 1907, this note of McAlister Bros. & Co. was placed with the National Bank of Commerce as collateral to secure the payment of their indebtedness to this bank. It seems that the note in question was not originally placed as collateral security to the indebtedness due by the Tishomingo Savings Institution to the National Bank of Commerce, but after the making of the note by McAlister Bros. & Co., and delivering it to the Tishomingo Savings Institution, the McAlister Bros. & Co. note was substituted in lieu of some other collateral, which the Tishomingo Savings Institution had placed with the National Bank of Commerce, which had matured. The Tishomingo Savings Institution failed some time in December, 1907, and failed to pay its indebtedness to the

National Bank of Commerce, and this last bank was forced to undertake to realize on its securities. Before this note of McAlister Bros. & Co. became due, the note falling due January 1, 1908, the National Bank of Commerce, on November 26, 1907, wrote to McAlister Bros. & Co., calling their attention to the fact that they were the holders of the note for five hundred dollars, dated January 1, 1907, and maturing on January 4, 1908, and asking them to advise the bank what their intentions were with reference to the payment of this note. Again, on February 18, 1908, after the note became due, the National Bank of Commerce wrote to McAlister Bros. & Co., again calling their attention to the fact that the note was due, and asking for a remittance on same. Again, on March 10, 1908, they wrote, asking that the note be paid, and calling attention of McAlister Bros. & Co. to the fact that it was long past due. The record does not show that there was ever any reply made by McAlister Bros. & Co. to these letters. On November 26, 1908, the National Bank of Commerce sold this and several other notes held by it as collateral security at public auction, and this note was bought in by George L. Edwards for the account of the bank, and afterwards the National Bank of Commerce sold this note to one J. B. Sanders, the plaintiff in this suit. Sanders instituted a suit on this note as the legal holder thereof, commencing same by attachment.

It is needless for us to pursue the course of the proceedings, since there is no question involved as to that; but the defense made to the note by McAlister Bros. & Co. is that the note was procured to be executed by fraud, and is void for want of authority in the Ripley Branch Bank to issue the certificate; that at the time these certificates of deposit were issued the Branch Bank represented itself to be solvent, when, as a matter of fact, it was insolvent, and in great need of money, and was issuing these certificates to various parties for

the purpose of raising funds and saving itself from financial ruin; and that these facts were unknown to the makers of the note. At the time that this note was taken by the National Bank of Commerce as collateral, it is not shown that they had any knowledge of the alleged fraud; nor is it shown that McAlister Bros. & Co. ever stated to them, when written to about the note, that they had any such defense, or any defense. On the hearing the trial court gave a peremptory instruction to find for the defendants, and from this judgment an appeal is prosecuted.

This record, as a matter of fact, nowhere shows that, at the time of the issuance of these certificates of deposit, the bank issuing same was insolvent; but, on the contrary, the manager of the bank, Mr. Murry, testified that at the time these notes were taken and the certificates of deposit issued there was no question as to the solvency of the bank. Therefore, so far as this record shows, when this note was given and the certificate of deposit issued, the bank was entirely solvent, and its insolvency on the 10th day of December following grew out of the panic occurring about that time and the inability of the bank to realize on its securities. There was no want of consideration for the execution of this note, and no failure of consideration. The note was executed for the certificate of deposit, and the certificate of deposit was delivered. At the time of delivery it seems to have been a solvent certificate; but later the bank failed, and the certificate of deposit became valueless. But innocent holders of the note cannot be affected by this. If a person give his note for stock in a corporation, and the corporation prove a failure, the validity of the note is not affected thereby. The principle involved in this case is the same. McAlister Bros. & Co. got what they undertook to buy with this note. It is difficult for us to understand from this record on what theory the lower court could have granted a peremptory instruc-

tion to find for the defendants. It does appear that on November 26, 1908, at the time this note was sold, but long after it had become due, and long after the attention of McAlister Bros. & Co. had been called to the fact that the National Bank of Commerce held the note, Mr. Murry went to St. Louis at the time of the sale, and gave notice to all persons present at the sale that there was an offset outstanding against this note. But such was not a fact in law. Murry undertook to give notice that these notes were given for certificates of deposit, and that the bank had paid nothing on these certificates of deposit; but this notice was given, as stated before, in 1908 or 1909, and long after the National Bank of Commerce had become an innocent holder of same. When this notice was given, it appears that the plaintiff was present and afterwards bought the notes from the Bank of Commerce; but, of course, plaintiff is fully protected by the good faith of the National Bank of Commerce, the original holder of the note.

Section 4001 of the Code of 1906 is not involved in this litigation in any way. Under the proof in this record, McAlister Bros. & Co. had no defense to this suit on the note, either before or after notice of the assignment. Murry testifies that these certificates of deposit were issued in good faith and for the purpose of procuring the business of the persons to whom they were issued, that the certificates were issued at a time when the banks were solvent and to extend the business of them, and there is no testimony in contradiction of this.

Reversed and remanded.

J. F. SMITH ET AL. v. GEORGE LEAVENWORTH.

[57 South. 803.]

1. TAX SALE. *Validity. Alluvion. Apportionment. Navigable waters.*

A sale of the land for taxes is void, where at the time of such sale the lands are assessed to the state, and the fact that before the sale was had, some one drew a line through the word "state" on the assessment roll does not validate the sale, as such change did not constitute an assessment of the land to unknown owners.

2. CODE 1892, SECTION 2735. *Tax title. Possession.*

By virtue of Code of 1892, section 2735, so providing when a party and his grantor have been in possession of land for three years under a tax deed, he obtains a good title, even though the tax deed was void.

3. TAX DEED. *Alluvion. Title.*

A tax deed describing the property as "all fractional section 24, township 27, range 7 west, in Coahoma County;" conveys title to the alluvion which has been formed by the river adjoining said section 24.

4. NAVIGABLE WATERS. *Alluvion. Title.*

The owner of land adjoining a navigable river owns the alluvion formed in front of his land, though such alluvion first commenced to form in front of adjoining property and extended later in front of his property.

5. NAVIGABLE WATERS. *Alluvion. Apportionment.*

The general rule for apportioning alluvion between coterminal land owners, is to give each such proportion of the new shore line as they possessed of the former shore line before the formation of the alluvion. This rule however is not absolute and there may be exceptional cases requiring the application of a different rule in order that justice may be done.

APPEAL from the chancery court of Coahoma county.
HON. M. E. DENTON, Chancellor.

Suit by George Leavenworth against J. F. Smith et al. From a decree for complainants, defendants appeal.

Complainant filed a bill in chancery, setting up his claim to fractional section twenty-four, township twenty-seven, range seven W., in Coahoma county, and alleging that defendant Smith claimed title to section fourteen adjoining and that said lumber company claimed the timber on said section fourteen by virtue of a deed from said Smith. The bill further alleges that, at the time this land was originally platted, sections fourteen and twenty-four were fractional sections, extending to the old river bank, which touched the corner of sections thirteen, fourteen and twenty-four; that for many years accretions have formed along the old river bank, and the channel of the stream was changed; that on the land so formed by these accretions there has grown up valuable timber, and that said lumber company claiming under its deed from Smith, has entered upon a certain portion of the accretions between the north and south line passing through said corner and an east and west line passing through said corner; that the accretions in question lie south of section fourteen and west of section twenty-four, and extend to the present channel of the Mississippi river. The bill further alleges that said lumber company is claiming the ownership of the timber on this disputed territory by virtue of its conveyance from Smith, which conveys, among other sections, section fourteen, "together with all accretions thereof. The latter include the accretions lying west of a line extending from the corner of sections thirteen and fourteen and twenty-four, south to the bank of the river, as well as accretions lying west of sections fourteen and eleven." This conveyance was dated December 29, 1906. The prayer of the bill is for an injunction to restrain the cutting by the defendants of the timber of the complainant on this disputed land, and for a decree settling the rights of the parties to the accretions formed

in this territory, and establishing a boundary line between the accretions belonging to complainant and defendants. The answer of the appellants attacks complainant's title to section twenty-four and to the accretions in question, and is a general denial of the allegations of the bill of complaint. The answer does not set up any claim of title to section twenty-four in the defendants. On the hearing the court entered a decree dividing the accretions between the complainant and defendants, giving equal acreage to each of the accretions in the disputed territory. From this decree defendants appeal.

The complainant deraigns his title as follows: "Tax Collector to the State of Mississippi. Tax sale, dated 1876. Consideration, \$16.80. Sold for the taxes of 1875. Lands conveyed: All fractional section 24, township 27, range 7 west." "Tax Collector to the State of Mississippi. Tax sale, dated 3|8|81. Consideration, taxes for 1880. Lands conveyed: All fractional section 24, township 27, range 7 west." "State of Mississippi to John Scott. State tax deed, dated 5|20|99, filed 1|8|01, recorded 1|21|01, Book 1, page 527. Consideration, \$40.50. Land conveyed: All fractional section 24, township 27, range 7 west." "Jno. Scott to George Leavenworth. Warranty deed, dated 3|13|02, filed 3|19|02, recorded 3|19|02, Book 4, page 22. Consideration, \$80.00. Lands conveyed: All fractional section 24, township 27, range 7 west." It will be seen that complainant relies upon a tax sale in March, 1876, for the taxes of 1875, and also a tax sale in March, 1881, for the taxes of the year 1880. It seems that there was some irregularity in the sale for the taxes of 1875, and the lands were again listed, and sold in 1881 for the taxes of 1880. Complainant entered into possession of said section twenty-four, in the year 1899, by agreement with Scott, who afterwards executed a deed to the property, and relies, also on adverse possession for a space of three years

after two years from the date of said tax sale, as provided by section 2735 of the Code of 1892, brought forward as section 3095, Code of 1906.

The defendants attack the sale of 1881, because the land was not subject to taxation at that time; the title being then vested in the state under the sale of 1876, which latter was a valid sale. It seems that the attorney general had found some objection to the sale, and had ordered the lands struck from the auditor's records and certified back to the county. When they were so certified back, the sheriff or clerk, or some one in the office of one of these officers, ran a line through the word "State" on the assessment roll, said land being listed as belonging to the state, and the sheriff then proceeded to resell the land to the state for the taxes of 1880. The land is described in the tax deed as "all fractional section 24, township 27, range 7 west."

The following is a plat of the premises in question:

Brief for, appellee.

[101 Miss.]

O. G. Johnson, for appellant.

Maynard & Fitzgerald and *Wynn & Wasson* for appellee.

No brief of counsel on either side found in the record.

SMITH, J., delivered the opinion of the court.

The sale of the land in controversy to the state for taxes in the year 1881 was void, for the reason that it was at the time assessed to the state. The two faint pencil lines, if such in fact there be, drawn through the word "State" on the original assessment roll, cannot be held to constitute a change in the assessment, and to be the equivalent of an assessment to "Unknown," as contended by counsel for appellee. Public records cannot be altered in such a loose and irregular manner.

Appellee and his grantor have been in possession of this land for more than three years under this tax deed, and consequently appellee's title has been perfected by section 2735, Code 1892. *Hamner v. Yazoo Delta Lumber Co.* (this day decided), 56 South. 466.

One of appellant's contentions is that the alluvion formed opposite fractional section twenty-four was not embraced within the description of the land as assessed and sold. The description was as follows: "All fractional section 24, township 27, range 7 west, county of Coahoma." In addition to this, the assessment roll, under the heading "Number of Acres Held by State for Taxes," contains the figures 166. When fractional section twenty-four was originally surveyed and platted, it contained only 166.16 acres; the Mississippi river forming its southern and western boundary. Afterwards a large amount of alluvion formed opposite this section and section fourteen, the property of appellant lying north of it. This alluvion became the property of the owners of the mainland, constituted a part of each section to which it formed, and is included in the assessment and deed describing the land by its sectional number. *Jefferies v. East Omaha Land Co.*, 134 U. S. 178, 10 Sup. Ct. 518, 33 L. Ed. 878; *Towell v. Etter*, 69 Ark. 34, 63 S. W. 53; *Crill v. Hudson*, 71 Ark. 390, 74 S. W. 299.

The fact that the alluvion began forming north of section 24 and opposite the land of appellant is immaterial.

When it reached appellee's shore line in its southward progress, he became entitled to his portion thereof. The general rule for apportioning alluvion between coterminous landowners is to give each such proportion of the new shore line as they possessed of the former shore line before the formation of the alluvion. This rule, however, is not absolute, and there may be exceptional cases requiring the application of a different rule, as was done in the case at bar, in order that justice may be done. This however, it is unnecessary for us to decide, for the reason that the method of apportionment adopted seems to be more beneficial to appellant than the general rule, and we do not understand him to seriously complain of the method of apportionment, but of the fact that any apportionment was made at all.

Affirmed.

Suggestion of error filed and overruled.

HENRY EVANS AND R. A. BLACKBURN v. H. W. HOYE ET AL.

[57. South. 805.]

1. CHANCERY COURT. *Injunction. Estoppel. Accounting. Improvements.*

Where questions of estoppel, matters of accounting and claims for improvements are involved, the chancery court is the proper forum in which to litigate them.

2. TEMPORARY INJUNCTION. *Motion to dissolve. Final hearing.*

A temporary injunction should not be dissolved on motion, but retained for final hearing on full proof where such a course is necessary to do complete justice between the parties.

APPEAL from the chancery court of Newton county.
HON. SAM WHITMAN, JR., Chancellor.

Suit by Henry Evans et al. against H. W. Hoyer et al. From a decree dissolving a temporary injunction and dismissing the bill, complainants appeal.

The appellants, Evans and Blackburn, filed a bill in the chancery court, alleging that Evans had entered into a parol agreement with appellee, Hoyer, by which it was agreed that Hoyer should convey to Evans a certain tract of land for the sum of eight hundred dollars, to be paid within three years; that immediately Evans began to make improvements upon the place, and had expended the sum of seven hundred and forty dollars thereon, which money was expended in good faith; that at the end of the third year—that is, in 1909—Evans demanded of Hoyer a deed to the place, which was declined. The bill averred that Evans had bought supplies from Hoyer during the years 1907, 1908, and 1909, but had never been able to get a settlement of his account; that, not being able to get the deed to the property when demanded, he had entered into a written contract with Hoyer on December 16, 1909, whereby it was agreed that he should pay Hoyer one hundred dollars rent for the year 1910, and upon the payment of the further sum of one thousand dollars Hoyer was to deed him the place; that in the fall of 1910 Evans paid Hoyer one hundred dollars rent and all of the account for supplies for the year 1910, and took his receipt therefor; that thereupon Hoyer advised Evans that he held a deed of trust against him for two hundred and ninety-three dollars, secured by certain live stock and agricultural products, in which deed of trust one Powe was trustee. Evans denied that he had executed any such instrument, and that he owed Hoyer anything. The bill further alleged that Evans had become indebted to R. D. Cooper for the sum of one hundred dollars, and had secured same by deed of trust on two bales of cotton from the first gathered and marketed in the year 1910; that, however, the first two bales of cotton were sold and the proceeds applied to the

payment of one hundred dollars rent to Hoyer, and the next two bales of cotton were sold and the proceeds applied to the payment of the supply account for 1910; that the fifth and sixth bales of cotton were sold and delivered to R. A. Blackburn (also complainant in this suit) in settlement of the Cooper note, which had been assigned to Blackburn; that thereafter the trustee, Powe, seized these last-mentioned bales of cotton by virtue of a writ of replevin, claiming the right to this cotton because of the deed of trust alleged to have been given by Evans to Hoyer, which deed of trust was dated subsequent to the date of the filing of the Cooper deed of trust. The bill further alleged that the deed of trust held by Hoyer was not executed *bona fide*, but, if it did exist, was obtained by fraud. The bill denies any indebtedness, and prays that an injunction issue to prevent the trustee and the justice of the peace before whom the replevin suit had been brought from proceeding further, and prays for an accounting with said Hoyer, and for judgment against him for the improvements. Upon this bill a preliminary injunction was granted.

The appellee answered, denying most of the averments of the bill, and made his answer a cross-bill. Affidavits were taken by each party, and on motion of the appellee the chancellor dissolved the injunction, denied the appellants relief, dismissed the bill, and granted an appeal to the supreme court. In support of the motion to dissolve, the defendants set up three causes: (1) Because the bill of complaint shows on its face that complainant is not entitled to the relief prayed for, there being no equity in the bill. (2) Because the bill seeks to enjoin proceedings in a court of law pending before a justice of the peace for cotton alleged to be the property of Blackburn by virtue of a deed of trust executed by Evans in favor of Cooper on the first two bales of cotton raised by Evans in the year 1910, while the bill shows on its face that the cotton in controversy was not

the first two bales. (3) Because the bill shows that Evans was a tenant of Hoyer during 1910, and Hoyer had a prior lien upon all products grown on the premises during said year and for supplies furnished by said Hoyer.

R. D. Cooper, for appellants.

The motion of appellees to dissolve the injunction states first that the bill has no equity and that appellants are not entitled to any relief. To this we will answer, that the bill charges that the execution of the deed of trust to Hoyer was not of his making, and that if obtained at all, from Evans it was through fraud and deceit. Prays for the cancellation of same; denies owing Hoyer anything at all. Prays for an accounting between the two. Prays for the improvements on the land described in the bill. Avers that Hoyer has no lien on this cotton by virtue of the alleged deed of trust or as landlord. That the Cooper deed of trust is prior in date and of filing to that of Hoyer's. Prays for an injunction and for general relief, etc. There are several grounds for equitable relief. Section 160 of the state constitution gives the chancery court jurisdiction and also 161. "Mutual accounts" followed by section 556, Code 1906, on mutual accounts. Section 609, Code 1906 gives authority to the chancery court to stay proceedings in a court of law. Certainly the chancery court has jurisdiction of the subject-matter.

It was stated by the chancellor that the charge of "obtaining of the deed of trust was through fraud and deceit, if obtained at all," is not full enough, that the fraud and deceit should be more elaborate. To this I think the charge that Evans did not execute the deed of trust, and if obtained at all it was through fraud and deceit, is full enough. It would be fraud on me to obtain my signature to an instrument of writing without my consent or knowledge and that is what was meant

by the expression in the bill. It really charges a forgery, but then in the alternative states that if obtained at all it was through fraud and deceit. I do not know how else to express it. If he was able to state specifically how his signature was obtained, then it would no longer be fraud, because he would have knowledge how it took place. The bill being sworn to is equal to a plea of *non est factum* in a court of law, and placing the burden on appellee, Hoyer, to show its genuineness. In answer to the second ground in appellee's motion; it states that appellants are undertaking to enjoin the proceedings in the justice court and claiming the cotton involved by virtue of a deed of trust executed by Evans to R. D. Cooper, when the bill admits that these two bales are not the two covered by the Cooper deed of trust, etc.

The bill charges that the Cooper deed of trust is prior in date and filing for record to the alleged deed of trust of H. W. Hoyer, but counsel for appellees hold that the Cooper deed of trust does not hold these two bales of cotton because they constitute the fifth and sixth bales and the Cooper deed of trust calls for the first two bales gathered and put on the market. But my contention is that if some other person other than Hoyer or some third party claimed this cotton by virtue of a deed of trust that there might be some merit in counsel's contention.

But the bill charges that Hoyer got the first two bales or the proceeds of the cotton, which Cooper held a deed of trust against prior in date of filing for record. It further charged that Hoyer had been paid the one hundred dollars rent for the use of the place for the year 1910, and that the supply account with Hoyer had also been paid, and the exhibits to appellee, Hoyer's answer admits this fact. So Hoyer having received the cotton of Cooper and his rent note and the supply account having been paid, he, Hoyer, is not in a position to contend for this cotton. He has neither a lien by virtue of

the deed of trust nor as landlord, for the supply bill has also been paid. Besides a court of equity will not permit Hoyer to take that which does not belong to him, and hold that which might belong to him in a proper case. In other words, R. A. Blackburn has a right of action against Hoyer for the first two bales of cotton, if Blackburn must turn this cotton involved over to Hoyer. I think a court of equity estops Hoyer from contending for this particular cotton, even admitting his deed of trust to be valid. The third ground in the motion is because the bill shows Evans to be a tenant of Hoyer's and therefore Hoyer, as landlord has a prior lien, etc. I admit that a landlord has a prior lien to all other liens for supplies furnished the tenant for the year in which the supplies were bought, providing the landlord has not been paid. If paid for the supplies, he has no longer a lien, because a debt must exist from the tenant to the landlord before a lien may attach. But in this case no debt is admitted to exist. Now this disposes of the motion to dissolve the injunction.

W. I. Munn and J. R. Rowzee, for appellee.

As we understand the law there is no equity on the face of the bill. The grounds set out in the motion to dissolve the injunction are as follows:

First. Because the bill of complaint shows on its face that the complainants are not entitled to the relief prayed for.

Second. Because the bill of complaint has no equity on its face.

Third. Because the bill shows that the complainants are not entitled to the relief prayed for and that they have an adequate remedy at law.

Fourth. Because the bill of complaint seeks to enforce a contract for the sale of land and is barred by the statute of frauds and in the same suit seeks to enjoin the suit before C. H. Doolittle, a justice of the peace. in a court of law.

We desire to call the court's attention to the case of *Favett Wilson et al. v. John W. Miller*, 143 Ala. 264, handed down by that court in November, 1904. The opinion in this case was rendered by Harrelson, chief justice. The court said, among other things, that it is familiar law "that a court of equity will not take jurisdiction where there is a clear, complete and adequate remedy at law. The mere intervention of fraud, no discovery or any special equitable relief being sought, will not authorize a court of chancery to grant relief, or entertain concurrent jurisdiction with the court of law, in cases cognizable at law." *Youngblood v. Youngblood*, 54 Ala. 486; *Peoples v. Burns*, 77 Ala. 292.

It is also true "that a court of equity is reluctant to interpose by injunction against an ejectment at law, founded on a legal title the plaintiff is fairly proceeding to establish. An equitable case, a case of purely equitable cognizance, must be made to appear, before the court will interpose to restrain the proceedings in the action." *Kerr on Injunctions*, 26; *Lehman v. Shook*, 69 Ala. 492. We think the law applicable to the cases now before the court is well expressed by Judge Tyson in his opinion on application for rehearing. This opinion by Judge Tyson is reported in the *American and English Annotated Case*, vol. 5, pages 727, 728, and 729, and among other things, he said: "A court of equity will restrain the collection of a judgment or the prosecution of a suit at law where there is satisfactory proof of accident, mistake, or fraud, but a due regard for the rights of co-ordinate judicial tribunals, a proper respect for their records and proceedings, and for the protection and security of persons interested therein, demand that this restraining power should not be exercised except in cases where the purposes of justice clearly require it." A court of equity will not, in a case of concurrent jurisdiction, grant an injunction against a pending action in a court of law for the mere purpose of transferring the juris-

diction from the law court. *Crane v. Bunnell*, 10 Paige (N. Y.) 333. And notwithstanding the presence of fraud, accident or mistake, an injunction will be denied unless it appears that adequate redress cannot be had in the pending action. In a number of other decisions the jurisdiction of courts of equity to enjoin proceedings at law has been sustained without considering particularly whether the defense of fraud was available at law where the action was being fraudulently prosecuted and an attempt was being made to use the court of law as an instrument of injustice and oppression. In *Boyce v. Grundy*, 3 Pet. (U. S.) 215, it was held that equity would not refuse to enjoin for fraud proceedings at law because there might be a remedy at law, but that the remedy must be plain and adequate, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. But while a court of law has no power to grant affirmative equitable relief it has power to adjudicate an equitable defense, and if this is all that the protection of a litigant's rights requires he cannot resort to a court of equity to restrain the action. *Williams v. Mitchell*, 30 Ala. 299; *Murray v. Barnes Buchanan*, 13 Ill. 55; *Crane v. Ely*, 37 N. J. Eq. 564. See, also, *Anthony v. Valentine*, 130 Miss. 119. Accordingly, it has been held that a judgment in favor of the defendant in a suit on a note as effectually cancels the note as would a decree in equity, and that suit on a note alleged to have been obtained by fraud will not be enjoined so that a court of equity may decree a cancellation of the note. *House v. Oliver*, 123 Ga. 744, 51 S. E. 722.

The propriety of confining litigation to the forum in which it is first acquired is universally recognized, and where a court of equity acquired jurisdiction of a suit on the ground of fraud, it will retain jurisdiction and dispose of the case, and to this end will enjoin an action subsequently begun in a court of law in regard to the

same subject-matter. *Gregory v. Howell*, 118 Iowa 26, 91 N. W. 778. See, also, *Henwood v. Jarvis*, 27 N. J. Eq. 247. The reported case is distinguished in the later case of *Hudson v. Jackson*, 144 Ala. 410, 39 So. 227, the court saying that the ruling of the reported case "was based upon the principle that it is the common right of all men to have their legal rights determined before law forums, and their contested legal demands tried by a jury of their country." This was substantially the language used by Justice Stone in his dissenting opinion in the case of *Lehman v. Shook*, 69 Ala. 486, which opinion is said to express the view of the court in the reported case.

The only point that we see for consideration in this matter is whether or not the injunction was rightfully sued out, and in as much as the bill of complaint and exhibits thereto expressly show and allege that the property in litigation before C. H. Doolittle, a justice of the peace, that is to say the two bales of cotton referred to, was not included in the Cooper deed of trust, it follows that the complainants in this suit are not entitled to relief in any court and it matters not whether it be at common law or of chancery.

Argued orally by *R. D. Cooper*, for appellant.

Argued orally by *W. I. Munn*, for appellee.

WHITFIELD, C.

This was a case in which the injunction should have been retained until the final hearing. There was no possible way in which the various equities involved in this case could have been settled in the replevin suit. The court had jurisdiction to go into the mutual accounts existing between the parties, and settle the equities arising therefrom, and to determine the matter of the claim for improvements. Hoyer was estopped to prosecute the replevin suit for the two bales of cotton here involved.

Hoye had no lien for supplies, because they had been paid, as shown by his receipted accounts; nor for rent for the year 1910, for that had been paid, as shown in the same way. Hoye could not retain the proceeds of the first two bales of cotton, belonging to Blackburn, and institute this replevin suit for the other two bales. The chancery court, therefore, was the proper forum in which to litigate these three questions—the accounts, the estoppel, and the claim for improvements. The court erred in prematurely dissolving the injunction. It was peculiarly a case where the injunction should have been retained for full proof on the final hearing, and complete justice could be done between the parties.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the decree is reversed, the injunction reinstated, and the cause remanded.

Reversed and remanded.

W. H. EICHELBERGER v. A. W. COOPER.

[57 South. 808.]

REFORMATION OF DEEDS. *Mistakes. Equity jurisdiction.*

A bill in equity will lie for the reformation of a deed and to adjust the equities between the parties, where complainant charges that when he conveyed certain lands to defendant, it was agreed that complainant was not the sole owner of one of the tracts, and that he was conveying only his interest therein, that he left the preparation of the deed to defendant who was an attorney, and assumed that it would be drawn according to their agreement, but that instead the deed contained a warranty, of title as to both tracts and defendant had refused to pay the purchase price because of an alleged breach of warranty.

APPEAL from the chancery court of Scott county.

HON. SAM. WHITMAN, JR., Chancellor.

Suit by W. H. Eichelberger against A. W. Cooper. From a decree dismissing the bill, complainants appeal.

Appellant was complainant in the court below, and appellee was defendant. The case comes to the supreme court from a decree overruling complainant's demurrer to defendant's plea to the jurisdiction and dismissing the original amended bills of complaint. The pleadings disclose the following facts: On August 27, 1904, the appellant conveyed by warranty deed to appellee two tracts of land in Scott county, Miss.; one tract containing sixteen acres and the other containing eighty-one acres. The consideration was five hundred dollars; the deed reciting that it was *paid*. At the time the deed was executed, appellee executed his note for four hundred and fifty dollars, due November 15, 1905, with ten per cent interest from date until paid. The note recites on its face that it is for the land conveyed by the said deed. The note was not paid when due and some time thereafter, to-wit, December 4, 1909, appellant filed a bill in chancery for the purpose of foreclosing his vendor's lien upon said property for the balance of the purchase money, as evidenced by said note, together with interest thereon; the bill of complaint praying that the said property should be sold and applied to the satisfaction of the indebtedness, and praying also for general relief.

Defendant answered, admitting the transaction, and entering a general denial of the allegations of the bill, and alleging that complainant had represented that he had a perfect title to the property, whereas other parties had an interest in one of the tracts of land; that defendants had subsequently sold to one Duckworth all of said property, and given him bond for title, before he discovered that there were outstanding claims against it, and that upon discovering this he had filed suit to

perfect the title, but had subsequently obtained quit-claims from the claimants; that thereafter he discovered that other parties claimed an interest in the property, and he had filed another suit to perfect the title, which was still pending; and that he had an agreement with complainant that whatever the costs of perfecting the title amounted to should be deducted from any balance due complainant by defendant. He further states that he would not be protected on his warranty until his title is perfected; that a vendor's lien was not reserved by complainant when he sold the same to the defendant; and that when the title is perfected, if anything is due complainant, it will be paid.

Thereafter, by leave of the court, complainant, who avers that he had just been advised that the property had been conveyed away by the defendant, filed an amended bill, stating that it was understood between him and the defendant that complainant was not the sole owner of the smaller of the tracts of land, certain of his relatives having an undivided interest therein, and that he only conveyed his interest in said smaller tract, and that he had left the preparation of the deed to the defendant, who was an attorney, and assumed that it was drawn in accordance with their agreement, and prayed for a reformation of the instrument, and for a sale of the property to satisfy his lien.

To this amended bill the defendant filed a plea to the jurisdiction, setting up the fact that he had no interest in the land, having conveyed same to Duckworth, who was an innocent purchaser for value, without notice that the title was not perfect, and that the chancery court is without jurisdiction to render any decree in said cause affecting said land; that whatever right of action complainant might have is exclusively cognizable in a court of common law jurisdiction.

To this plea complainant demurred on the grounds: (1) That the plea stated no complete defense; (2) that,

since the bill asks for reformation of the contract, equity has original jurisdiction; (3) that when jurisdiction is obtained for one purpose, it will be retained for complete relief; (4) that the plea does not deny that complainant is entitled at least to a portion of the relief prayed for.

Issue was joined, and on the hearing the chancellor overruled the demurrer, sustaining the plea, and dismissing the bills.

Watkins & Watkins, for appellant.

We respectfully submit that an examination of the pleadings in this case and the allegations therein, in connection with the rules of law established by the courts makes evident the following:

First, that the defendant's plea to the jurisdiction is insufficient in law, and did not justify the dismissal of the original and amended bills of complaint, by decree of the chancellor.

Second, that notwithstanding the allegations of said plea, the complainant has shown that he had not an adequate remedy at law for the recovery of the purchase money, without first obtaining reformation in a court of equity as a preliminary thereto and that intervention of a court of equity is made necessary by reason of defenses interposed by the defendant; and that upon this ground complainant is entitled to the relief asked in his bill of complaint, and the chancellor erred in dismissing his said bill of complaint.

Third, that, notwithstanding the allegations contained in the said plea to the jurisdiction, the pleadings show a mistake on his part and fraud or inequitable conduct on the part of the defendant which places this case unquestionably within the exclusive jurisdiction of a court of equity, for the reason that reformation of the instrument must be had in order that the rights of the complainant may be protected, and the danger of action at

law for breach of warranty covenant in the deed, to which he would have no defense, avoided; and that the chancellor erred in ordering the dismissal of the said bills of complaint.

We respectfully submit that this case should be reversed upon the chancellor's decree, and the complainant given opportunity to prove the facts alleged in his original and amended bills of complaint. Story, Eq. Pl., par. 658-662; *Cheney v. Patton*, 134 Ill. 422, 25 N. E. 792; *Foster et al. v. Winchester*, 9 So. 83; Puterbaugh, "Chancery Pleading and Practice, pp. 98-99 (5th Ed.), 31 So. 3, 34 Cyc. 907; *Cummings v. Steele*, 54 Miss. 647; *Hitches v. Pettingill*, 58 N. H. 3; *Albany City Sav. Ins. v. Burdick*, 87 N. Y. 40; *Martin v. Hempstead Co. Levee Dist.*, 135 S. W. 453; *Trusdell v. Lehman et al.*, 47 N. J. Eq., 218 and *Bush v. Merriman*, 87 Mich. 260; *Cooke v. Nathan*, 16 Bark. (N. Y.) 342; *Hand v. Cox*, 51 So. 519; *Elder v. Nat. Bank*, 43 S. W. 19, 62 Tex. 695, 31 S. E. 972; *Peques v. Mosby et al.*, 7 S. & M. (Miss.) 346 and 347; *Edwards v. Clark*, 10 L. R. A. 659.

Robert L. Bullard, for appellee.

There is, as we think but one of the several points raised by appellant in his assignment of error and brief that demands serious consideration, if that does. That is that appellant is entitled to a reformation of the deed by him to the appellee, and therefore, having jurisdiction of the case for that purpose, the court has jurisdiction to grant the full relief prayed for and give him a personal judgment on the note, even though it is conceded that no decree could be rendered by the court under the pleadings in this case that would operate in any way against the land for part of the purchase money of which the note was given. The plea avers with precision that before the bill was filed the land had been sold for a valuable cash consideration to third parties who hold it without any notice, actual or constructive,

of any equity existing between complainant and respondent. These vendors of the respondent are not made parties to the bill, and if they were, the deed could not be reformed as against them. See, *Goodbear v. Dunn*, 61 Miss. 618; *Nugent v. Kilpatrick*, 61 Miss. 61; *Kilpatrick v. Kilpatrick*, 1. C. 124.

Neither can a vendor's lien be asserted against property in the hands of innocent purchasers without notice.

This being true the court below was powerless to reform the deed in question so as to affect the interest of the present holders of the land, or to enforce a vendor's lien against it. Therefore, there is no relief prayed for in the bill that the court could render except against the defendant on his promissory note, and of this the court has no jurisdiction except only as an incident in the administration of some independent equitable relief.

But appellant says that this independent relief, is the reformation of the deed from Eichelberger to Cooper. The sufficient answer to this is, that a court of equity will not reform a written instrument, or entertain a bill for that purpose, unless it is necessary to some relief sought in that or some other court. In other words it will not do a useless thing that will not in any way benefit or affect the right of any party to the litigation. The court will only exercise this jurisdiction where it is necessary to the assertion of some primary right. This is elementary but see, *Pomeroy Equity Jurisprudence*, secs. 1375-1377.

WHITFIELD, C.

The chancery court had jurisdiction, in the case made by this record, to reform the deed between Eichelberger and Cooper, if the proof warranted any reformation, and then to adjust the equities between the parties, and enter a decree for the one or the other, as the evidence might

warrant, on the matters growing out of the warranty on the one hand and the costs to Cooper of getting in the outstanding claims on the other.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the decree is reversed and the cause remanded, to be proceeded with in accordance with this opinion.

Reversed and remanded.

R. E. KENNINGTON v. T. W. HEMINGWAY ET AL.

[57 South. 809.]

1. HUSBAND AND WIFE. *Gifts. Validity. Code 1906, section 2522, Statutes, Construction. Intent.*

A gift by a husband to his wife of a personal ornament, clothing and wearing apparel suitable to her condition in life, is valid as against a third person, although such gift is not evidenced by a written instrument, acknowledged and recorded as provided by section 2522, Code 1906.

2. STATUTES. *Construction. Legislative intent.*

In the construction of statutes, courts chiefly desire to reach the real intention of the framers of the law, and knowing this to adopt that interpretation which will meet the real meaning of the legislature, though such interpretation may be beyond or within, wider or narrower than the mere letter of the enactment.

APPEAL from the chancery court of Hinds county.

HON. G. G. LYELL, Chancellor.

Suit by R. E. Kennington against T. W. Hemingway et al. From a decree dismissing the bill, complainants appeal.

In 1882 T. W. Hemingway married Mrs. E. L. Catchings, and they lived together as husband and wife until

1907, when they were divorced. In the year 1903, while they were living together, and while Hemingway was solvent and in a prosperous condition, he gave his wife a diamond ring worth about seven hundred dollars, which she kept after they were divorced, with his full knowledge and consent, and which she wore as a personal ornament. In the year 1908, Mrs. Catchings, who had then been divorced from Hemingway, pledged the ring with a bank in Jackson as security for a loan. The money was loaned Mrs. Catchings without knowledge of the fact that the ring had been given her by her husband, and without knowledge that Hemingway had ever owned it, or that he was indebted to the appellant. In November, 1909, the appellant, Kennington, obtained a judgment against Hemingway, and enrolled the same on December 11, 1909. Afterwards, on April 12, 1910, Hemingway was adjudicated a bankrupt, and a trustee appointed to take charge of his estate.

Afterwards the appellant filed a bill in chancery against Hemingway, Mrs. Catchings, the bank, and the trustee of the bankrupt estate of said Hemingway, as parties defendant. Later, Mrs. Catchings having died, the suit was revived against the administrator of her estate. The prayer of the bill was that the court adjudicate the rights of the various parties to the ring held by the bank, and that the judgment against Hemingway in favor of Kennington be decreed to be a lien upon said ring, and that said ring be sold to satisfy the lien. Appellant contends that the gift by Hemingway to his wife of this ring is in violation of section 2294 of the Code of 1892, requiring gifts between husband and wife to be in writing and acknowledged and recorded, in order to be valid against claims of third persons.

Mayes & Longstreet, for appellant.

We do not challenge the general doctrine that the literal import of a statute is not to be followed if the re-

sult would be absurd, and if any more reasonable view can be taken. But while that is the general rule, it is also true that where the language of an act is clear and unambiguous, it must be held to mean what it plainly expressed, and no room is left for construction. Where the words are free from ambiguity, and the purpose plain, the courts have no power to create exceptions by construction. *Eastman v. State*, 109 Ind. 278, 18 Am. Dig. (Dec. Ed.), tit. Statutes, sec. 19.0

The wisdom or want of wisdom displayed in the act is not a question for the courts. *Merchants Bank v. Cook*, 4 Pick. (Mass.) 405; *Gorham v. Steinan*, 7 Ohio N. P. 478; *Rossmiller v. State*, 114 Wis. 169.

By doubts and difficulties arising in the construction of statutes, is not meant those which are engendered by the predilection of the court, or its notions about what the law ought to be, but such doubts and difficulties as are inherent in the problem to be solved." *St. Louis, etc., R. R. Co. v. Delk*, 158 Fed. 931. This court has frequently announced similar rules. *Smith v. Halfacre*, 6 How. 58; *Daily v. Swope*, 47 Miss. 367; *Hazlehurst v. Mayes*, 96 Miss. 656.

Secondly. There is no such absurdity resulting from this statute as calls for any construction by the court, limiting or restricting the exact application of the statute exact language, exactly as written. This, we submit, becomes clear, when the history of the statute itself is considered. Give the law its proper setting, and it seems clear that there is no absurdity whatever. As remarked in the *Delk* case above, the law may not accord with the court's idea of what the law ought to be; but there is no legal absurdity in it. 2 Black's Comm. 433, 435; Geo. Miss. Dig., p. 391; 2 Black's Comm., p. 436, 21 Cyc. 1172; Geo. Miss. Dig., pp. 394-397, 3 Atk. 394; Noy's Max., ch. 49; 2 Bl. Comm., p. 436; *Towns v. Pratt*, 33 N. H. 345, 19 N. J. Eq. 316.

John B. Ricketts, for appellee.

The facts in this case are not in dispute; they are fully set out in the briefs of other counsel, but, as administrator of the estate of Mrs. Catchings, I desire to state that the conveyance from Hemingway to his wife was perfectly valid.

(1) Because a diamond ring, worn as the personal apparel, being wearing apparel, does not fall within the condemnation of the statute. In other words, it was neither goods nor chattels. The phrase "goods and chattels" means nothing more than goods, because the word "chattels" is controlled by the word "goods." See Am. and Eng. Ency. Law, vol. 5, p. 1022.

To illustrate this proposition, section 4784 of the Code requires all persons doing business as "trader or otherwise" to have a sign disclosing the name of the principal, etc. It was held in the case of *Yale v. Taylor*, 63 Miss. 598, that the term "trader or otherwise" meant simply a trader, and that is the exact rule of construction of the statute in question. Certainly, it was not the intention of the legislature to prohibit conveyance of such property as would be subject to execution. The diamond ring in question was wearing apparel, and was not subject to execution. Cyc., vol. 17, p. 943.

It has been repeatedly held that a watch worn by a debtor cannot be taken for execution. *Mack v. Parks*, 69 Am. Dec. 267.

Watkins & Watkins, for appellee.

Section 2522 of the present Code, being section 2294 of the Code of 1892, is in the following language:

"What necessary to validity of conveyance (Laws 1900, ch. 90).—A transfer or conveyance of goods and chattels, or lands, or any lease of lands, between husband and wife, shall not be valid as against any third person, unless the transfer or conveyance be in writing and acknowledged and filed for record as a mortgage or

deed of trust is required to be; and possession of the property shall not be equivalent to filing the writing for record, but, to affect third persons, the writing must be filed for record."

It is contended by the appellant in this case that the transfer on the part of T. W. Hemingway to his wife, made in 1903, which was even before the creation of appellant's debt, and six years before the same was placed in judgment, is invalid even as against an innocent purchaser from the wife of T. W. Hemingway, who, in good faith, and for value, acquired the ring without notice, actual or constructive, of the invalidating circumstances.

We respectfully submit to the court that the section is not susceptible of the construction sought to be placed upon it by appellant's counsel. The object of the section was not that of invalidating every conveyance between husband and wife, but only invalidating conveyances as against the interest of certain third persons and, of course, it would follow as a natural sequence that the rights of the third persons referred to should come into existence before the rights of any innocent purchaser from either the husband or wife should accrue.

This court has made the meaning of this statute very plain in two decisions. In the first place, in the case of *Green v. Waems*, 85 Miss. 566, it limited the term "third person" by saying that third person must mean a lien creditor. It does not mean any third person, or every third person, even if that third person should ever happen to be a debtor. The decision is clear and explicit. Therefore, we find that this court has expressly limited the "third person" to a creditor, and not only a creditor, but a lien creditor.

In the case of *Groce v. Ins. Co.*, 94 Miss. 201, the court further held that a third person did not refer to an insurance company, carrying a fire insurance policy on the improvements situated upon the real estate. Therefore,

we have by a settled line of decisions the law established that a conveyance between husband and wife is not *ipso facto* invalid. In the first place, it is perfectly good between the husband and wife; in the next place, it is perfectly good as against everybody, except lien creditors; and we say it, therefore, follows as a natural sequence that the lien must accrue and be obtained before the rights of innocent purchasers are involved.

Take for instance, the case of *Gregory v. Doods*, 60 Miss. 549; in that case, there was a successful effort to reach the proceeds of household furniture which was given by the husband to the wife without a formal deed of conveyance and by the wife sold to the garnishee, George S. Dodds. That case proceeded upon the theory that Mr. Dodds, being an innocent purchaser for value, acquired a good title to the furniture, but only the proceeds in his hands could be subjugated.

This question, however, has been definitely settled by this court in the case of *Stone v. Threefoot Brothers*, 54 So. 595. In that case, a man by the name of L. Weitzel bought a piano; after he bought the piano a judgment was recovered against him, but was erroneously indexed in the circuit clerk's office as being against L. G. Weitzel. Weitzel gave the piano to his wife without any formal transfer, and after Mrs. Weitzel had acquired the piano, after the judgment had been placed of record, she sold the same to the appellant, Mrs. Stone, in this case. It was admitted that Mrs. Stone did not have actual knowledge of the judgment, and had no notice at all, unless the erroneous recording was constructive notice to her.

Counsel for the appellant quote from the concluding paragraph in the case of *Stone v. Threefoot Brothers*, which is as follows:

“Had Weitzel owned the piano and appellant purchased from him, she would have gotten a good title against the judgment, because the enrollment of appellee's judgment did not afford constructive notice that it was against L. Weitzel.”

We are utterly unable to see what consolation the appellant can get out of that case.

Counsel for the appellant argue that no title passed to Mrs. Hemingway at all from her husband; they are mistaken about that; the title passed; the conveyance was perfectly good between Hemingway and his wife; the legal title was in Mrs. Hemingway after the delivery, but it was liable to be set aside and subjected to the claim of any lien at any time prior to the accrual of the rights of an innocent purchaser for value.

The statute does not say that title shall not vest in a conveyance from husband to wife; it merely says it shall be invalid. In other words, that it shall be liable to be set aside at the suit of certain third persons, and who these thirds persons are, and who they are not, the court has made exceedingly clear.

SMITH, J., delivered the opinion of the court.

One of the questions presented by this record, and which, if answered in the affirmative, will dispose of the whole case, is this: Is a gift by a husband to the wife of a personal ornament—in this instance, a diamond ring—"valid as against any third person," when such gift is not evidenced by a written instrument, acknowledged and recorded as provided by section 2294 of the Code of 1892, the same being section 2522 of the Code of 1906? In the case at bar the ring was given to the wife eight years prior to the institution of this suit, at a time when the husband was solvent, and without any intention on his part of defrauding any one. This section is as follows: A transfer or conveyance of goods and chattels, or lands or any lease of lands, between husband and wife, shall not be valid as against any third person, unless the transfer or conveyance be in writing and acknowledged and filed for record as a mortgage or deed of trust is required to be; and possession of the property shall not be equivalent to filing the writing for

record, but, to affect third persons, the writing must be filed for record." The words "goods and chattels" are ordinarily broad enough to cover all personal property; and if the statute is to be interpreted literally, all gifts of personal property, including necessary wearing apparel and ornaments for the person, made by a husband to the wife, must be by a written instrument, acknowledged and recorded; and in that event the fact that the wearing apparel of every person is exempt from execution or attachment would not aid the wife, for as against any third person such wearing apparel would be dealt with as if it remained the property of the husband. If this is the meaning of the statute, its absurdity is manifest, and that the legislature intended such a result is inconceivable.

After the enactment of this statute it still remained, as it had always been, the legal and moral duty of the husband to support his wife in a way suitable to her situation and his condition in life. In order to do this he must, among other things, give her necessary wearing apparel, and ought, so far as his means will permit and within the limits of a wise economy, to give her such personal ornaments as good taste and the usage of the society in which she moves demands. If the innumerable gifts which he must make her in discharging this duty, if the transfer of each article of clothing and each personal ornament, must be by a written instrument, acknowledged and recorded, the statute requiring it would not only be an absurd one, but would be unreasonable, and would result in such great inconvenience and expense as to be intolerable. Legislators must be presumed to be reasonable and sane men, "and to intend the natural, direct, and probable consequences of their acts, that these shall not be absurdly or unreasonably construed, and therefore that they intend to avoid absurdities and nonsense." 4 Hughes, Grounds and Rudiments of the Law, 1104. If, therefore, wearing apparel

and personal ornaments can be, consistent with the rules of construction, excluded from the operation of this statute, it becomes our duty to do so. *Railroad Co. v. Hemphill*, 35 Miss. 17; *Ingraham v. Speed*, 30 Miss. 410; *Board of Education v. Railroad*, 72 Miss. 236, 16 South. 489; 2 Lewis' *Suth. Statutory Construction* (2d Ed.), sections 488-490, and authorities there cited; 36 Cyc. 1108. At the same time, we must bear in mind that the enactment of a wise or a foolish statute is for the determination, not of the courts, but of the lawmakers; and when the intention of the lawmakers is clearly understood, the statute must be enforced as written, it matters not to what absurd results such enforcement may lead.

Human language is not a perfect vehicle for conveying thought, and it frequently happens that words used have a broader or narrower meaning than that intended by the person using them. One of the maxims of the common law, therefore, is "*verba intentioni debent inservire*." (Words are to be governed by the intention.) As was said by this court in *Board of Education v. Railroad Co.*, *supra*: "It is familiar learning that, in the construction of statute, courts chiefly desire to reach and know the real intention of the framers of the law, and, reaching and knowing it, then to adopt that interpretation which will meet the real meaning of the legislature, though such interpretation may be beyond or within, wider or narrower than, the mere letter of the enactment." The courts have repeatedly given the words "goods, wares and merchandise," as they appear in various statutes, a broad or restricted meaning, according to the context and the evident purpose of the statutes. See authorities cited in 20 Cyc. 1272; 14 Am. and Eng. Ency. of Law, 1079. The object of the statute was to prevent the perpetration of frauds, by means of pretended transfers of property between husband and wife. *Gregory v. Dodds*, 60 Miss. 549. The number of frauds that could be perpetrated by means of pretended gifts

by husbands to wives of wearing apparel and personal ornaments is so infinitesimal in comparison with the number of such gifts that must be made by husbands in the discharge of the duty to support their wives, and the inconvenience, expense, and absurdity of evidencing such gifts by a written instrument, acknowledged and recorded, is so great, that the conclusion is irresistible that the legislature did not intend to include such gifts within the meaning of the words used in the statute. In *Queen v. Clarence*, L. R. 22 Q. B. Div. 65, it was said by Lord Coleridge that "in such a matter as the construction of a statute, if the apparent logical construction of its language leads to results which it is impossible to believe that those who framed or those who passed the statute contemplated, and from which one's own judgment recoils, there is in my opinion good reason for believing that the construction which leads to such results cannot be the true construction of the statute."

The question propounded in the beginning of this opinion must therefore be answered in the affirmative, and the decree of the court below must be affirmed.

Affirmed.

EMMA HOGGETT v. STATE.

[57 South. 811.]

1. CRIMINAL LAW. *Suspension of Sentence. Void provisions. Powers of Court.*

Suspending the imposition of a sentence is nothing more than a continuance of a case after plea or verdict of guilty for sentence at a later time and one who does not object to the suspension of sentence, cannot complain at a subsequent term that the court has no authority to suspend sentence, and that by so doing it lost jurisdiction to proceed.

2. SAME.

A proviso in the order of the court suspending a sentence, that the accused leave and remain out of the county is void.

3. SAME.

A court has no power to indefinitely suspend the imposition of a sentence after plea or verdict of guilty where the court fails to impose sentence the case remains in the same attitude as if it had simply been continued for sentence with accused's consent.

APPEAL from the circuit court of Forrest county.

HON. PAUL B. JOHNSON, Judge.

Emma Hoggett was convicted of unlawful retailing. The sentence of the court was suspended for a while and at the next term of the court imposed, and she appeals.

The facts are stated in the opinion of the court.

J. E. Davis, for appellant.

I most respectfully submit that the judgment of the lower court is illegal and void, and that this cause should be reversed, and the defendant discharged. The court has no power to arbitrarily exile a person. It is beyond the scope of his "broad discretion to banish a person to a foreign jurisdiction." The original judgment in this case "suspended sentence provided defendant leaves and

remains away from Forrest county, Mississippi, and pay all costs." The costs were paid. The latter judgment, imposing a fine does not indicate that there was any legal evidence before the court of the defendant's failure to comply with the former order. The same is therefore void. 23 Cyc. 684, par. E.

It is a mere nullity, 23 Cyc. 681, and in the consideration of the fact by the court, the appellant was entitled to be confronted with the witnesses against her; and she should have been granted an opportunity to show by competent evidence whether the said former order had not been violated, even admitting that the court had the right to pronounce the judgment, which we deny.

The punishment pronounced by the sentence must, of course, be that which the law provides for the particular crime charged against the defendant. 21 Am. and Eng. Ency. of Law, 1076.

There is no law or precedent granting a court the power to impose such sentence and to render such a judgment as appears to have been done in this case. The sentence is void because it is for an indefinite time. 21 Am. and Eng. Ency. of Law, 1082.

Jas. R. McDowell, assistant attorney-general, for appellee.

This is an appeal from the circuit court of Forrest county. Appellant was indicted for the unlawful sale of intoxicating liquors, plead guilty, and sentence suspended, upon payment of costs, under condition. The condition was broken and the court at a subsequent term of court, imposed the suspended sentence, from which judgment and sentence this appeal is taken. The points of law in this case are identical with those in the case of *Bossie Hoggett*, 101 Miss. 272, and I beg to refer your honorable court to a consideration of the state's brief in that case.

SMITH, J., delivered the opinion of the court.

Appellant having entered a plea of guilty to an indictment charging her with the unlawful sale of intoxicating liquor, the court, instead of imposing sentence immediately, ordered that the same be suspended, "provided the defendant leaves and remains away from Forrest county, Miss." At a later term of the court, on motion of the district attorney, sentence was imposed upon appellant on this plea entered at the former term. From this last judgment this appeal is taken.

Her complaint is that the court was without authority to suspend the imposition of the sentence, and that by having done so it has lost jurisdiction to proceed further in the cause, and that, if mistaken in this, the second judgment was entered without any evidence being introduced tending to show that she had failed to leave and remain away from Forrest county. Suspending the imposition of a sentence is nothing more than a continuance of a case after plea or verdict of guilty for sentence at a later time. It is unnecessary for us to decide what the rights of appellant would have been, had the court below arbitrarily and over her objection continued her case after her plea of guilty had been entered for sentence at a subsequent term, for the reason that appellant did not object to this course being pursued, and, consequently, she cannot now complain thereat. "*Consensus tollit errorem.*" *Gibson v. State*, 68 Miss. 241, 8 South. 329.

The proviso contained in the order suspending the sentence was void. What was this day said in the case of *Fuller v. State*, 57 South. 806, relative to the power of a court to suspend the execution of a sentence, applies with equal force to the power of the court to indefinitely suspend the imposition of a sentence after plea or verdict of guilty. The case remained in the same attitude, therefore as if had simply been continued for sentence with appellant's consent.

It does not appear that appellant was induced to plead guilty by reason of any expectation on her part that the imposition of sentence would be suspended. What her rights, therefore, would have been, in that state of case, is not here involved.

Affirmed.

Suggestion of error overruled.

BOSSIE HOGGETT v. STATE.

[57 South. 812.]

CRIMINAL LAW. *Second offense. Vagrancy. Punishment.*

Where a greater punishment may be inflicted for a second or subsequent violation of a penal law than for the first, the fact that the offense is a second or subsequent violation must be directly averred in the information or indictment to justify the increased punishment; else it will not be considered as an offense for which the increased punishment can be inflicted but will be deemed to be the first offense.

APPEAL from the circuit court of Forrest county.

HON. PAUL B. JOHNSON, Judge.

Bossie Hoggett was convicted of vagrancy and appeals.

The facts are fully stated in the opinion of the court. No brief of counsel on either side found in the record.

SMITH, J., delivered the opinion of the court.

Appellant having entered a plea of guilty to an indictment charging her with vagrancy, the court, instead of imposing sentence immediately, ordered that sentence be "suspended, on payment of costs, so long as defendant remains out of the state." At a later term of the court the following judgment was rendered on appel-

lant's plea of guilty: "Comes the district attorney, who prosecutes for the state, and it appearing to the court that the defendant had entered a plea of guilty to said charge at a former term of this court, and that sentence had been suspended during good behavior, and it further appearing to the court that the defendant has been guilty of illegal conduct, it is therefore considered by the court that the defendant be sentenced to jail for ninety days, and pay all cost, and stand committed until paid; sixty days of said sentence is suspended during the time defendants remains away from Hattiesburg, Miss."

This case is controlled by the opinion this day rendered in *Emma Hoggett v. State*, except that the sentence imposed upon appellant was that provided for a second conviction of the crime of vagrancy, and her plea of guilty was to an indictment which contained no allegation that she had been theretofore convicted of a similar offense. "Where a greater punishment may be inflicted for a second or subsequent violation of a penal law than for the first, the fact that the offense is a second or subsequent violation must be directly averred in the information or indictment, to justify the increased punishment; else it will not be considered as an offense for which the increased punishment can be inflicted, but will be deemed to be the first offense." 10 Ency. of Pl. and Pr. 489; 22 Cyc. 356.

The suggestion of error is sustained, the judgment of the court below reversed, and the cause remanded for proper sentence.

Reversed and remanded.

MEREDITH ISAIAH CANADA v. YAZOO & MISSISSIPPI VALLEY
RAILROAD COMPANY.

[57 South. 913.]

1. CONTRACTS FOR BENEFIT OF THIRD PARTIES. *Pleading. Matters of Im-
plication.*

Where a contract is made with a carrier by a wife for her husband's benefit the husband has a right to bring suit for its breach in his own name.

2. SAME.

Where in such case, the declaration alleges that the contract sued on was made with an agent of the defendant carrier, this carries with it the inference that in making it the agent acted within the scope of his authority.

APPEAL from the circuit court of Warren county.

HON. H. C. MOUNGER, Judge.

Suit by Meredith Isaiah Canada against the Yazoo & Mississippi Valley Railroad Company. From a judgment for defendant, plaintiff appeals.

The appellant, who was plaintiff in the court below, filed his declaration, alleging in substance that the defendant had agreed with plaintiff's wife at Rosedale, upon the payment of the fare from Vicksburg to Rosedale, to transport plaintiff, who was then sick in the hospital at Vicksburg, from Vicksburg to his home in Rosedale; that plaintiff's wife had paid the money for his transportation to the defendant's agent at Rosedale, and had an agreement with the agent that plaintiff, whose address was given, would be notified as soon as possible that the ticket was waiting for him at the office at Vicksburg, and to furnish him with said ticket in accordance with the contract; that because of plaintiff's physical condition it was important that he be promptly notified, but that the defendant did not notify plaintiff until three

days after the ticket was bought by plaintiff's wife for him, and then only after plaintiff had telegraphed his wife to find out the cause of the delay in procuring his transportation. Plaintiff brought an action for breach of the contract, claiming punitive damages in the sum of five thousand dollars.

To this declaration the railroad company filed the following demurrer, which was sustained by the court: "(1) The said count does not set forth facts sufficient in law to constitute a cause of action against this defendant. (2) The said count in said declaration does not show that the alleged sale of a ticket from Vicksburg to Rosedale, under the alleged circumstances set forth in said second count, was made for any consideration other than the payment of the regular lawful rate for the transportation of a passenger from Vicksburg to Rosedale. (3) Because said count does not show that the agent therein referred to had authority to make the contract alleged in said count of said declaration to have been made. (4) Because the contract and agreement alleged in said count in said declaration, if there was one, was with the wife of the plaintiff, and not with the plaintiff; and, if there is any cause of action thereunder, it is in favor of the wife of the plaintiff, and not in favor of the plaintiff. (5) Because said second count in said declaration does not show any right of action in the plaintiff."

Albert M. Bonelli, for appellant.

The entire undertaking on the part of the railroad company in the instant case was to deliver the ticket as soon as possible to the plaintiff in the city of Vicksburg and to transport that plaintiff from Vicksburg to Rosedale. This contract was made by the ticket agent.

A part of this undertaking, viz.: telegraphing the notice and delivery of a ticket in Vicksburg was special in its nature. The demurrer of the defendant in the second, fourth and fifth causes assigned attacks the validity

of this part of the undertaking. The defendant contends that this special undertaking is not binding upon the company as there was no extra consideration for it, and in general attacks the validity of the special undertaking.

The supreme court of the state of Mississippi has been confronted with the question as to the validity of a special undertaking made by the ticket agent in the sale of a ticket. *Illinois Central Railroad Co. v. Reid*, 46 So. 146, 93 Miss. 458.

In this Reid case the facts are as follows:

The agent of the railroad company promised a purchaser of a ticket that a certain train would stop at a certain station on the return trip of the promisee and let him debark. The consideration paid to the ticket agent was the price of an excursion ticket upon which the plaintiff took his trip. The defendant company, on the return trip of the plaintiff Reid acting through the conductor, refused to stop the train at the place as the ticket agent had promised. The train in question did not stop at the promised place in the usual course of its running.

The plaintiff Reid brought an action against the railroad company for this breach of the special undertaking.

The court held that the special arrangement made by the duly authorized ticket agent at the time of the making of the special contract to be binding upon the company and allowed the plaintiff to recover damages for the failure of the defendant to keep the special promise.

The court in this Reid case, treated the whole arrangement as a part of the ticket contract, and held that it was compulsory upon the conductor of the train on the return trip of the plaintiff to listen to any statement setting forth any arrangement made by the duly authorized ticket agent.

The close similarity between the Reid case and the case at bar is that in neither case did the defendant have to do in the course of its duty to the public what the ticket agent promised that the company would do. The company did not have to stop its train at the station as promised by the ticket agent in the Reid case. The company in the case at bar did not have to undertake the delivery of a ticket in the city of Vicksburg. These two duties are not imposed upon the railroad companies by the common law. In the Reid case there was no extra consideration paid by the plaintiff for the special undertaking. In both cases the special undertakings were made by the ticket agents.

The Reid case follows the *Harper case*, 83 Miss. 560, 35 So. 764; *Riley Case*, 68 Miss. 765, 9 So. 443, 13 L. R. A. 38, 24 Am. St. Rep. 309, and the *Drummond case*, 73 Miss. 819, 20 So. 7. These cases allowed evidence as competent to show that a special arrangement had been made in the sale of a ticket in the actions that were brought for the breach of the special undertakings. The special arrangements are thus made binding by the law, as otherwise such evidence would have been held incompetent.

It is not necessary that the ticket agent should have been expressly authorized to make this special undertaking, so as to hold the company to it. A corporation is bound by duly implied authority. *Metzger v. Southern Bank*, 54 So. (Miss.) 241-244. In this recent case the supreme court speaking through Justice Whitfield said in regard to implied authority that: "The corporation is as much bound as a natural person by duly implied authority of its agents as well as by authority expressly given." In *Rivers v. Yazoo & Miss. Valley R. R. Co.*, 43 So. 471, 90 Miss. 196, 9 L. R. A. (N. S.) 931, a corporation was held liable for slander.

"The test is," said the court, "whether the slanderous words were spoken by the agent of the company

while acting within the scope of his employment and in the actual performance of the duties of his principal touching the matter in question.”

The undertaking in the instant case was in regard to a ticket, and was made by one whose duty it was to sell tickets. The appellant submits that this was in the words of the *Reid case, supra*, “A special undertaking made by the duly authorized ticket agent.” As such the company was bound to its terms.

The plaintiff is the proper party to sue the railroad company. The contract was made for his benefit.

The demurrer of the defendant attacks the declaration on the ground that the declaration “purports to hold this defendant liable to the plaintiff under a contract which if made, is shown by the declaration not to have been made with the plaintiff but with the wife of the plaintiff.”

The demurrer in this regard is wrongly taken. The declaration may not show any direct authorization from the husband to the wife to buy the ticket and have the same delivered to him in Vicksburg as per the special arrangement made by the wife. It does show that the wife was the agent of the husband in sending him the where-with-all to get home on. The wife chose the means of carrying out her authority. She was but a general agent for this purpose.

It hardly needs citation of authority to sustain the doctrine that the agent is allowed some discretion in carrying out the purpose for which the agency was created. Mere detail is left to the agent, the means whereby is left to the agent.

It was the plaintiff’s contract in the first place. If not then it clearly was by ratification, as the plaintiff took the benefit and used it (the ticket) to go home on.

Looking at this cause as assigned for demurrer and viewing it in the light of the general rule of Mississippi, it becomes contrary to sound principles. The general

rule of Mississippi is to allow a party to sue, though he may not be the party with whom the contract was made, if the contract was made for his benefit. This rule is exemplified in cases where the sendee of a telegraph message is allowed to sue the telegraph company for any damage suffered by the sendee on account of any neglect of the company.

In *Shingleur v. Western Union Tel. Co.*, 72 Miss. 1030, 18 So. 425, the doctrine is stated to be: "Putting the right to sue on the ground that in case of delivery of an altered message, upon which the sendee has acted to his damage, the sendee's right to sue is in tort for the injury to him, we find this view clearly and universally upheld by the American authorities."

The case of *Western Union Tel. Co. v. Allen*, 66 Miss. 549, 6 So. 461, extends the same right of action to the sendee where there has been a delay in the delivery of a message. And in respect to the general liability of the defendant to the sendee enunciates the principle that is followed with great force in the *Shingleur case, supra*.

Thompson in his work on Electricity hits the nail on the head in respect to the right of the sendee to sue.

"The true view which seems to sustain the right of action in the receiver of the message or in the person addressed where it is not delivered, is one which elevates the question above the plane of mere privity of contract and places it where it belongs, upon the public duty which the telegraph company owes to the person beneficially interested in the message." (Quoted from *Shingleur case*.) *Wells v. Postal Tel. Co. Co.*, 35 So. 190, 82 Miss. 733; *Western Union Tel. Co. v. Jackson*, 50 So. (Ala.) 316; *Anniston Cordage Co. v. Western Union*, 49 So. (Ala.) 770; 27 Am. and Eng. Ency. of Law (2d Ed.), 2 Am. and Eng., annotated cases 396-398.

Practically all the American courts hold the rule enunciated above to be the law. *Frazier v. Western Union*

Tel. Co., 45 Or. 414, 67 L. R. A. 319; *Fast v. Canton A. & N. R. R. Co.*, 77 Miss. 498, 27 So. 525; *Waters v. Mobile & Ohio R. R. Co.*, 74 Miss. 534; *Alabama & Vicksburg R. R. Co. v. Pounder*, 35 So. 155, 82 Miss. 568; *Kansas City M. B. R. R. Co. v. Cantrell*, 12 So. 344 70 Miss. 329; *Western Union Tel. Co. v. Allen*, 6 So. 461, 66 Miss. 549; *Nevin v. Pullman Palace Car Company*, 106 Ill. 222, 46 Am. St. Rep. 688-691.

Mayes & Longstreet, for appellee.

If for no other reason the decision of the court below in this case should be affirmed, for want of privity between the party bringing the suit and the defendant. The contract alleged to have been broken was not made between the plaintiff and the defendant, nor does the declaration allege that in making the alleged contract the wife of plaintiff was acting as his agent. It is fundamental that the pleader is supposed to have stated his case most strongly for himself; and in this declaration there is no such allegation.

The brief for the appellant frankly admits that there are no direct authorities discovered by its attorney bearing on the questions in this case. But on this point, we have discovered a direct authority, and so far as we have found, it is the only one in the books.

See *Ogles v. Nashville, etc., Ry. Co.*, 60 S. E. Rep. 1048; also reported in 51 Am. and Eng. R. R. Cases, 765.

Second point: Moreover, this decision should be affirmed on the merits of the question raised, independent of that of privity.

The substance of the claim is that the railroad company incurred a liability for the reason that the plaintiff was not notified for some two or three days, he being in Vicksburg, that a ticket was at Vicksburg office for his use.

Counsel for the appellant again frankly admits that he finds no case holding his view or bearing on the sub-

ject directly. Neither have we found any except the case above, which went off on the question of privity.

It is unquestionably true, and it is fundamental law, that parties dealing with railroad companies are presumed to know their course of business. In the *Sevier case*, 61 Miss. 8, Judge Campbell so declared, and held that the plaintiff in that case must be held to have known the established usage of calling out the name of the station, and for the passenger to leave the car on its arrival at his destination, etc., and it was there held that the promise of the conductor was his personal obligation, etc.

It is not customary for tickets to be sold with an agreement by the agent that a special notice is to be given to some person away from the station house in some town far away. If such a promise was made, it was a separate and independent undertaking of the agent, which is not authorized by the company; or at least is not shown in the declaration to have been authorized by the company.

If an agent does an act beyond his ordinary and usual powers, special authority from the carrier must be shown in order to render it binding as the carrier's act; so held in *Giles v. Taff Vale Co.*, 21 El. and Bl., 822, 75 E. C. L. 822.

The citation of the Reid case in the brief of appellant and other similar cases, is misleading; for they do not reach this question. It is one thing to say and hold that a ticket agent, acting within the scope of his known and given authority, who states to the purchaser at the time of the sale of the ticket the privilege and rights which the holding ticket carries with it, and quite another thing to say and hold that a ticket agent, has a right to make a special contract for special and extraordinary services, not on payment of consideration therefor to the company, but on the usual and given ticket price whereby the ticket is to be delivered. You cannot reason from one thing to the other.

In the former case the agent is making a representation about the effect of his ticket, and his rights under the ticket to a ticket purchaser who thereby becomes at the time a passenger; in the latter case he is undertaking to make an executory contract outside of and not in anywise related to the effect and operation of the ticket or the rights to be enjoyed under it when delivered. The last thing he has no right to do and thereby bind the company to a suit for damages.

Appellant in his brief expressly states that there was no common law liability resting upon the railroad company to deliver a ticket to a purchaser anywhere besides at its box office. He admits that he can produce no authority sustaining his contention; he fails to show any statutory requirement; and as we have stated above, if he intends to invoke any special power, as in point of fact this case does, that authority should have been expressly averred and shown in the declaration; and the declaration could only be good by such a showing.

Argued orally by *Albert M. Bonelli*, for appellant.

SMITH, J., delivered the opinion of the court.

The contract sued on having been made by plaintiff's wife with appellee for his (plaintiff's) benefit, he has the right to maintain a suit for the breach thereof in his own name. *Sweatman v. Parker*, 49 Miss. 19, 30 Cyc. 65; 15 Ency. Plead. and Prac. 509.

The allegation that the contract sued on was made with an agent of the defendant carries with it the inference that in making it the agent acted within the scope of his authority. 31 Cyc. 1627; 16 Ency. Plead. and Prac. 900. Whether or not this agent in fact acted within the scope of his authority can therefore be determined only when the proof comes in.

The demurrer should have been overruled, and consequently the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

ANNA SMITH v. STATE.

[57 South. 913.]

CRIMINAL LAW. *Circumstantial evidence. Instructions.*

An instruction for the state that a person can be convicted of a crime or misdemeanor on circumstantial evidence is fatally erroneous, where it omits the necessary qualification that such circumstantial evidence, must be sufficient to exclude every other reasonable hypothesis than that of guilt.

APPEAL from the circuit court of Yazoo county.

HON. W. A. HENRY, Judge.

Anna Smith was convicted of vagrancy and appeals. The facts are fully stated in the opinion of the court.

Holmes & Holmes, for appellant.

The last assignment of error which we care to discuss is with reference to the first instruction given for the state, an instruction right in the teeth of two recent decisions of this court, to-wit: *Permenter v. State*, 54 So. 949, and *Irving v. State*, 56 So. 377. The last case was decided by Mr. Justice Smith on the 6th of last month.

The instruction complained of is as follows:

“The court instructs the jury for the state that a person may be proved to be a common prostitute by circumstances, and if the jury believe from the evidence in this case beyond every doubt that the defendant is a common prostitute, then it is their duty to find the defendant guilty as charged, although there may be no direct evidence of sexual intercourse.”

This instruction is more vicious than the ones condemned in the *Permenter* and *Irving* cases, *supra*. It has the defect of omitting “the necessary qualification that circumstantial evidence, in order to prove guilt be-

yond a reasonable doubt, must exclude every other reasonable hypothesis than that of guilt," and in addition simply says the jury may convict if they believe beyond every doubt, omitting the word reasonable.

In the *Permenter case*, 54 So. 949, the condemned instruction was as follows: "The court charges the jury that circumstantial evidence has been received in every age of the common law, and may arise so high in the scale of belief as to generate full and complete conviction in the minds of the jury of defendant's guilt; and when it does arise so high in the scale of belief as to generate full conviction in the minds of the jury of defendant's guilt beyond a reasonable doubt, then they are authorized to act upon it, and convict the defendant of the crime charged."

In that case this court speaking through Judge Anderson said: "This instruction was clearly erroneous. It is substantially the same instruction which was condemned by the court in *Williams v. State*, 95 Miss. 671, 49 South. 513. The court said of the instruction in that case: 'It is elementary law that a conviction may be had on circumstantial evidence alone, when by it guilt is proven beyond a reasonable doubt; but it is also elementary that, before such evidence can be said to prove guilt beyond every reasonable doubt it must exclude every other reasonable hypothesis than that of guilt. The fatal defect in the instruction is that it authorizes the jury to convict on circumstantial evidence which shows guilt beyond a reasonable doubt, without going further and informing the jury that the evidence must be so strong as to exclude every other reasonable hypothesis than that of guilt; in other words, explaining what, it takes to show where the evidence is circumstantial. This addition to the instruction is made necessary by the inherent difference in direct and circumstantial evidence.'"

Jack Thompson, assistant attorney-general, for appellee.

The instruction so strenuously objected to by the learned counsel for the appellant with reference to the right of the jury to convict the appellant upon circumstantial evidence is not error in this particular case, for the reason that all the writers on criminal law who treat the subject of sexual crimes, are unanimously of the opinion that this crime, except in very rare cases, is incapable of direct proof. In this connection I quote from the splendid work of Mr. Underhill on Criminal Evidence (2 Ed.), p. 384, as follows:

“That there need not be proof of the existence of a single act of adultery. The crime is sufficiently proved by showing the circumstances which will raise the presumption of unlawful intimacy.”

This statement is under the head of unlawful co-habitation, which of course, applies in this case.

Instructions in a case, as has been held by this court time and time again must be taken and considered together by the jury, and instructions number one and two, given on behalf of the state in this case announces the law of the case correctly. The defendant was given the benefit of the instructions of the law applicable to the case and the instructions refused for the appellant by the court were refused properly. The jury, with the testimony of the witnesses before them, and the correct law as given by the court, considered this woman's case and found her guilty as charged. I can see no reason why the verdict should be disturbed by this court.

SMITH, J., delivered the opinion of the court.

One of the instructions granted in the court below, at the request of the state, is as follows: “The court instructs the jury, for the state, that a person may be proved to be a common prostitute by circumstances, and

if the jury believe from the evidence in this case, beyond every reasonable doubt, that the defendant is a common prostitute, then it is their duty to find the defendant guilty as charged, although there may be no direct evidence of sexual intercourse." The granting of this instruction was fatal error, for the reason that "it omits the necessary qualification that circumstantial evidence, in order to prove guilt beyond a reasonable doubt, must exclude every other reasonable hypothesis than that of guilt." *Williams v. State*, 95 Miss. 671, 49 South. 519; *Permenter v. State*, 54 South. 949; *Irving v. State*, 56 South. 377.

The judgment heretofore entered, therefore, is set aside, the judgment of the court below reversed, and the cause remanded.

Reversed and remanded.

TOWN OF DURANT v. ATTALA COUNTY.

[57 South. 914.]

1. TAXATION. *Refund of tax. Statutory provisions. Repeal. Reservation.*

The repeal of a statute without any reservation takes away all remedies given by the repealed statute, and defeats all actions pending under it at the time of its repeal. The rule is especially applicable to the repeal of a statute creating a cause of action, providing a remedy not known to the common law, or conferring jurisdiction where it did not exist before, and is carried to such an extent as to abate proceedings pending upon appeal after verdict in favor of plaintiff.

2. SAME.

Everything falls with the abrogated law not fully executed under it, except where contract rights have vested. Especially is this true in matters of taxation.

APPEAL from the circuit court of Attala county.

HON. G. A. McLEAN, Judge.

Mandamus by the town of Durant against Attala county. Petition dismissed and plaintiff appeals.

The facts are fully stated in the opinion of the court.

Booth & Pepper, for appellant.

Lockett & Guyton, H. T. Leonard, S. L. Dodds and R. H. Thompson, for appellee.

Argued orally by *R. H. Thompson*.

MAYES, C. J., delivered the opinion of the court.

By chapter 90, p. 165, of the Laws of 1886, it was provided:

“Section 1. Whenever the turnpikes and bridges over Big Black river and swamp opposite the towns of Pickens, Goodman, Durant and West, in the county of Holmes, be made free turnpikes and bridges to all parties crossing the same, the board of supervisors of said county are hereby authorized and required to set apart all bridge taxes levied and collected on the property of the town opposite the bridge and turnpike thus made free, and the tax collector of said county shall keep a list of the bridge tax collected on the property of the incorporated town opposite the turnpike and bridge thus made free, and turn over the list of said bridge tax to the county treasurer who upon demand made by a written order of the board of aldermen of any of the said towns whose turnpike and bridge has been made free shall pay over all bridge tax collected from said town to the treasurer of said town, which shall be appropriated to the keeping in good repair said bridge and turnpike.

“Section 2. Whenever any of the above bridges and turnpikes are made free as provided for in the first section of this act, the board of supervisors of the county or counties lying immediately east and contiguous to

said bridge and turnpike, or bridge and turnpikes, *are hereby authorized* to direct the treasurer of their county to pay over to the treasurer of the town opposite the pike and bridge thus made free, a sum of money taken from the bridge tax collected from the citizens of said town, which sum shall be appropriated to the keeping in good repair said bridge and turnpike.”

Chapter 185, p. 252, of the Laws of 1888, amended the above act so as to make the second section *require* the board of supervisors “to direct the treasurer of their county to pay over to the treasurer of the town opposite the pike and bridges thus made free, a sum of money,” etc. In other words, the amendment to the act of 1888 made it mandatory upon the board of supervisors to require “the treasurer of their county to pay over to the treasurer of the town a sum of money taken from the bridge tax fund of said county equal to the amount of bridge taxes collected from the citizens of said town,” etc.

Subsequently, and before any money had been paid to the town under the laws of 1886 and 1888, as authorized, chapter 49, p. 40, Laws of 1892, was enacted, which provided:

“That all acts or parts of acts requiring board of supervisors of any counties to appropriate or pay money to the municipal authorities of any city, town or village in another county for the purpose of building, repairing or keeping up any roads, turnpikes or bridges, be and the same are hereby repealed; provided, that said turnpikes and bridges shall remain free public highways and each county maintain them as such to county line.

“This act shall be in force from and after its passage.”

It will be noticed that the act of 1892 contains no saving clause, but it is a general repeal of all acts or parts of acts requiring boards of supervisors to pay money to municipal authorities of any city, town, or village in

another county for the purpose of building, repairing, or keeping up roads, turnpikes, bridges, etc.

In this condition of the law, and in 1910, the town of Durant, in Holmes county, undertook to collect this money for the first time, and, looking to this end, filed a petition for mandamus against the board of supervisors of Attala county, and eight years after the repealing act of 1892. The petition recites the act of 1886 and 1888, without reference to the act of 1892, and sets out that after the passage of the act the turnpike and bridges over Big Black river opposite the town of Durant, in the county of Holmes, were made free to all parties crossing the same, and after the passage of the act the board of supervisors of the county of Holmes set apart to the town of Durant the bridge tax levied and collected on the property of the town on and after the year 1886, the tax being evidence by the list of bridge tax collected from the property of the town from the year 1886 to 1908. It is alleged in the petition that the tax collector paid the treasurer of the town the sum so collected, which was appropriated to the repair of the turnpike and bridges opposite the town of Durant and located in Holmes and Attala counties. The bridge tax collected and paid to the treasurer aggregated the sum of twelve thousand, eight hundred and ninety-one dollars and thirty cents. The petition then alleges that under the act of 1886, when the bridges and pikes were made free as required by the act, a liability accrued to the town against the county of Attala, and it became the duty of the board of supervisors of Attala county to require the treasurer of that county to pay to the town of Durant a sum of money, taken from the bridge tax fund of the county of Attala, equal to the amount of property tax collected from the citizens of the town of Durant, the money to be appropriated to keeping in repair the bridge and turnpike. The petition then alleges that the board of supervisors of Attala county has re-

fused to perform its duty, as required under the acts of 1886 and 1888, and has not paid to the treasurer of the town the amount which the county of Attala is liable for; that the town of Durant presented to the board of supervisors of Attala county its claim, and requested that same be allowed, but the board of supervisors disallowed the claim and dismissed the petition seeking to have same allowed. The petition concludes with a prayer that the board of supervisors of Attala county be required, by mandamus, to issue their, warrant on the treasurer of Attala county for the sum above specified. The board of supervisors of Attala county demurred to this petition for mandamus, and upon, a hearing the court dismissed the petition for mandamus, and from this action an appeal is prosecuted.

At the time of the institution of this suit the acts of 1886 and 1888, giving the cause of action to the town against the county were both repealed, so that at the time of the filing of this suit there was no foundation in law for it. The cause of action was conferred by statute, and by statute it was taken away. On page 1228, vol. 36, Cyc., the rule on this subject is stated to be that "the repeal of a statute without any reservation takes away all remedies given by the repealed statute and defeats all actions pending under it at the time of its repeal. The rule is especially applicable to the repeal of a statute creating a cause of action, providing a remedy not known to the common law or conferring jurisdiction where it did not exist before, and is carried to such an extent as to abate proceedings pending upon appeal after verdict in favor of plaintiff."

The rule stated above is followed by this court in the cases of *Bradstreet Co. v. Jackson*, 81 Miss. 233, 32 South. 999; *French v. State*, 53 Miss. 651; *Musgrove v. Railway Co.*, 50 Miss. 677, and *Anding v. Levy*, 57 Miss. 58, 34 Am. Rep. 435. In 81 Miss. 233, 32 South. 999, *supra*, Justice Calhoun for the court, after citing many authori-

ties, states "that everything falls with the abrogated law not fully executed under it, except where contract rights have vested. Especially is this true in matters of taxation." No contract rights are involved in this litigation. As long as the law existed it was within the power of the town of Durant to collect what the act specified should be paid by Attala county; but the whole right depended for its existence upon the statute which created the right, and when the law was repealed there was no authority left for any legal demand on the county. If the claim is lost, it is lost through the inaction of the town of Durant in not pursuing the law at the time there was a subsisting statute. In the case of *Musgrove v. Vicksburg & Nashville R. R. Co.*, 50 Miss. 677, it is said that "each legislative body has the same measure of lawmaking power as its predecessor. Each judges for itself as to the measures and policies that will conduce to the public good. Each may undo what its predecessor has done." It is simple justice to state that the act of 1892, repealing the acts of 1886 and 1888, was not referred to by counsel on either side in the court below, or in this court, until long after the case had been finally submitted.

Affirmed.

FINKBINE LUMBER COMPANY v. J. B. CUNNINGHAM.

[57 South. 916.]

1. MASTER AND SERVANT. *Independent contractor. Evidence. Sufficiency. Contributory negligence. Jury questions. Safe place to work. Delegation of duty.*

In a suit by a servant for personal injury, evidence, adduced as shown by the record in this case, held to show that he was the servant of the defendant and was not employed by an independent contractor.

2. MASTER AND SERVANT. *Actions. Evidence.*

In a suit by a servant for personal injuries, where the defendant claimed that the servant was employed by an independent contractor and was not its servant, evidence that the defendant carried accident insurance on the servants of the alleged independent contractor was admissible to show that defendant was the real master and that the alleged contractor was only one of its employees, and furnished strong proof of that fact.

3. MASTER AND SERVANT. *Contributory negligence. Question for jury.*

The facts in this case held to raise a question for the jury as to plaintiff's contributory negligence.

4. MASTER AND SERVANT. *Safe place. Continuing duty.*

The duty of the master to furnish his servant a reasonably safe place to work is a continuing duty, it is not satisfied by putting the place in a reasonably safe condition once, and then allowing it to become dangerous while the servant is at work, but it must be reasonably safe at all times.

5. MASTER AND SERVANT. *Nondelegable duty. Fellow-servants.*

The duty of the master to furnish his servant a safe place to work and to keep it safe is nondelegable, and the failure of an employee charged with this duty to keep it in that condition was the failure of the master which he could not shift to any other employee.

APPEAL from the circuit court of Harrison county.
HON. T. H. BARRETT, Judge.

Suit by J. B. Cunningham by next friend against the Finkbine Lumber Company. . From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Miller & Dodds, for appellant.

In view of the undisputed facts in this case, it is practically immaterial whether the defendant is to be regarded as an employee or not, for, upon the plaintiff's own showing, no conceivable liability is established.

Let it be assumed, for the present, that Guy, instead of being and continuing to be an independent contractor, alone responsible to those whom he employed in respect to delegable duties, was a mere foreman of defendant, the only pretense upon which it is sought to hold the latter, for an unfortunate accident, is that because, in the necessary course of the work being done by plaintiff (under contract with Guy), small pieces of wood, chips, strips or bark dropped upon the floor, which were frequently cleared away, and, in reaching for the oil can, he slipped on one of them and fell on the saw over which he had reached. He was at his regular place of work, was entirely familiar with the conditions, accumulation and insecure footing it might occasion, yet took the step he did.

It admits of no question whatsoever but that the plaintiff's opportunity for knowing the condition of the floor at the moment was far superior to that of defendant; it was perfectly obvious and was inevitable in the operation of a standard machine, therefore, how can negligence be predicated against the defendant?

And the court certainly erred in refusing charge No. 3, asked by defendant, for a reasonably safe place was undoubtedly provided for the plaintiff to work in. If his fellow servants failed to clean up right under his eye, he was bound to know it. There is no absolute guarantee of safety under all circumstances. *N. P. R. Co.*

v. *O'Brien*, 161 U. S. 457. Nor is the master bound to anticipate every conceivable contingency. *McKee v. R. R. Co.*, 83 Iowa 616.

If the place is unsafe because of the nature of the work and a servant suffers injury in consequence thereof, he cannot hold the master liable, provided reasonable precautions were taken by the master to avoid injury. The risk of injury from such cause is one of the risks assumed by the servant. 20 Am. and Eng. Ency. Law, 57, citing cases in the United States Courts: Delaware, Illinois, Massachusetts, Michigan, Missouri, New York, Oregon, Pennsylvania, Washington and Wisconsin.

“Obvious imperfections or inherent dangers in methods of work, existing at the time of entering upon the employment, cannot be made the basis of liability in favor of an employee who suffers an injury in the course of such employment.” *Ib.* 118-119, citing numerous cases.

Now, it will be recalled that Cunningham said himself the pieces would drop from the end of the saws on the floor and would be cleared away often. He knew the conditions exactly, yet, thoughtlessly, or in momentary forgetfulness of the danger of such a step, reached above the saw and slipped.

“If the servant is conscious of the dangers, the fact that he, for a moment, forgets their existence, and thereby sustains an injury, will not make the master liable.” *Ib.* 120.

Plaintiff's case rests absolutely upon the proposition that it was the duty of the defendant, at all times, to keep the floor, where he worked, clear of debris falling from the saws operated by plaintiff and to have anticipated such a contingency as arose, regardless of plaintiff's superior opportunities of knowing the conditions and dangers, if any there were.

Now, while it is true in the abstract, that the duty of providing safe appliances and safe place, for a serv-

ant to work in, is a continuing one, to be accomplished by a proper and timely inspection for defects and the repair thereof. That rule does not apply to defects or dangers arising in the course of the work which are not of a permanent character and do not require the help of skilled mechanics to repair, but which may easily be and usually are remedied by the workmen. On the same principle, an accumulation of debris, which can easily be and usually is removed by the hands working about the place, cannot subject the master to liability. *Ib.* 89. All this is just as applicable to such a change in the conditions of the place as arose in the present instance.

To make the master liable in such case would be to make him an unqualified insurer of his employees' safety.

Again, a servant who fails to use ordinary care in looking out for danger and is injured while in the discharge of a hazardous duty cannot recover therefor on the ground that the master failed to use means to prevent the injury. *Capital City Oil Works v. Black*, 70 Miss. 8.

It is a most extravagant assumption that, in providing this place for the stave maker, the employer should have guarded against the danger of his reaching up over a running saw and slipping upon the dropping debris, especially when the oil can could have been safely reached from either end of the box which enclosed the saws, if not from the back as well, which is proved to have been the case.

Upon the theory that plaintiff was an employee of defendant, it was claimed in the court below that the case of *Kneale v. Dukate*, 83 Miss. 201, was conclusive in plaintiff's favor. But that is a grave error. There is no similarity between that case and this, as appears from the statement in the brief of counsel for appellant in that cited where he says: "As a general rule, where a man operating a saw is injured by a piece of wood thrown from it at the time of the injury, in the natural course

of its operation, the injury is held to be one of the incidents attending the operation of the saw, the risk of which he assumes when he undertakes such work." In that particular case, the negligence of the master was his failure to remove or cause to be removed the strips, debris and other rubbish which had accumulated, from time to time, in the passage way through which appellant had to go; not the case of a temporary accumulation in the course of the work which is swept away many times a day in the plaintiff's own work.

It is apprehended that no case can be found which has imposed such a duty of inspection as is insisted on here.

It is concluded that the place was reasonably safe, to begin with, and it was kept as reasonably safe as could be, considering the nature of this work; that, unlike the case of *Kneale*, this plaintiff was fully aware of the conditions.

That no mortal could ever be held to anticipate such a contingency as arose in *Cunningham's* case.

J. H. Mize, for appellee, filed an elaborate brief fully covering all points in the case but too long for publication, contending:

1st. That plaintiff was a servant of defendant and not of an independent corporation. *Brower v. Timreck*, 71 Pac. 581, 66 Kan. 770; *Larsen v. United Gas Improvement Company*, 180 Fed. 268; *Bains v. Works Company*, 223 Pa. 96, 72 Atl. 279; *Tennessee Coal & Granite Co. v. Berges*, 47 So. 1029.

2d. That the evidence discloses a general liability on the part of defendant. *Kneale v. Dukate*, 93 Miss. 201; *Baker v. Duwamish Mill Co.*, 20 Am. Deg. Rep., Current Series, 738; *Myers v. Concord Lumber Co.*, 39 S. E. 960.

3d. That the instructions for plaintiff were correctly given and the instructions for defendant properly refused. *Hattiesburg Lumber Co. v. Blair*, not reported; *Kneale v. Lopez and Dukate*, 93 Miss. 201.

Argued orally by *E. Mayes*, for appellant.

Argued orally by *George Butler*, for appellee.

MAYES, C. J., delivered the opinion of the court.

In January, 1909, the Finkbine Lumber Company was engaged in the general sawmill business in Harrison county, and in connection therewith operated certain machines for the purpose of manufacturing staves, laths, and shingles. Some time in January of that year the company made a proposition to one W. H. Guy, whereby it was proposed that Guy should assume the control and operation of that part of the machinery of the company used for the manufacture of laths, shingles, and staves. The contract specified the price they were to pay Guy for the manufacture of the products named, and that Guy should use the material for the manufacture of laths, shingles, and staves and the machinery, of the Finkbine Lumber Company. Guy was to receive a certain price for the finished product. Settlement was to be made with Guy at the end of each week, and the contract required that Guy should turn in the names of all employees he might employ, so the Finkbine Lumber Company might charge them with accident insurance, rent, etc., should any of them live in the houses belonging to the Finkbine Lumber Company. The contract with Guy further stipulated that Guy should not employ boys younger than fifteen years of age. It seems that the reason for this stipulation was because the insurance company prohibited the working of boys under that age. The contract also contained a stipulation to the effect that, in case there should be any necessity for repairs that would fall upon the Finkbine Lumber Company to furnish, Guy should make a written requisition on the superintendent, Mr. Finlay. Guy commenced work for the Finkbine Lumber Company under this contract, the Finkbine Lumber Company furnishing all saws, belts,

oil, and power, and Guy employed the laborers, including appellee, who was a boy at that time about nineteen years of age.

The work in which appellee was engaged was in making staves in the mill. It appears that at the place where appellee was at work there were two saws. The material was first put in the cradle and shoved against the saws; the ends being chopped off to make it the proper length. After this was done the material was passed over to the appellee, Cunningham, and he attended to the manufacture of it on an edger into staves. In this way, and on account of neglecting to have it moved away properly, when the ends were cut off, there was an accumulation of sawdust and ends around the place where appellee was working; and, it being his duty to oil the saws, he reached up over the saws in order to get the oil can, and stepped on some blocks or sawdust, and slipped and fell across the saw, and was hurt. There was a "clean-up" man, whose duty it was to remove this accumulation; but this had been neglected for some while before the injury, and, according to the testimony of Cunningham, an accumulation of about a half bushel or more of little blocks and sawdust had been allowed to accumulate. Appellee states that Guy was the foreman of the Finkbine Lumber Company; but this is denied by the company, which asserts that Guy was an independent contractor. Appellee also testified that Mr. Finlay was the general superintendent of the mill, and was over Guy, and that Mr. Finlay would come through the mill, examine the staves, laths, or shingles, and direct Mr. Guy about them. Appellee could not hear what they were talking about. Finlay would then come to where appellee was and hurry him up. Appellee states that Finlay gave no orders other than to occasionally come by and hurry him up with his work. While appellee was so employed the lumber company collected from him certain amounts to be paid as premiums on accident in-

surance. This money was paid to the company, and by them applied to premiums for accident insurance, and the company required that this insurance be kept up on all employees working for Guy. Mr. F. G. Dickman, the assistant general superintendent of the mill, denied that appellee was ever employed by the Finkbine Lumber Company, or so appeared on their books.

At the time of the trial of this case Guy was gone and in no way connected with the mill plant. Mr. Dickman denied that the company had anything to do with the operation of that part of the machinery used by Guy in the manufacture of laths, staves, and shingles, except to furnish the power. He states that the company did not employ the laborers for Guy, and did not employ anybody to clean out that part of the mill used by Guy; that Guy employed and paid all employees working for him, and the company had nothing to do with it. Finlay was the mill superintendent and master-mechanic, and looked after the other parts of the machinery owned and operated by the Finkbine Lumber Company.

After appellee was injured, Dickman urged him to go to New Orleans for the purpose of having his arm examined, which appellee's father declined to let him do. It seems that the father refused to let his son go unless the lumber company would pay his expenses to go with the son. The company offered to send Dr. Rowan with appellee, but would not pay the expenses of the father to New Orleans. The company did offer to pay both the father's and the son's expenses to Hattiesburg, so as to enable the son to consult Dr. Ross. The father declined to do this, and wanted the son to go to New Orleans, but was not willing for the company to send the boy alone.

It appears that the company paid the boy after this accident about fifty dollars on account of the insurance. The testimony in reference to the lumber company requiring this insurance was all objected to, and the court

overruled the objection; and this is urged as a cause for reversal, among other causes assigned. Mr. Finlay testified that he was superintendent of the mill, and had been with the Finkbine Lumber Company in this capacity for something like five years. His duty was to oversee the operation in a general way, but he never gave any orders to Guy's men. Finlay states that he had called Guy's attention to the fact that the premises were not properly cleaned up, and Guy promised to have it attended to. Cunningham instituted a suit against the Finkbine Lumber Company, and recovered a judgment in the sum of two thousand dollars, from which judgment an appeal was prosecuted.

It is first contended that there is no liability on the part of the Finkbine Lumber Company, because the facts show that Guy was an independent contractor. Secondly, it is contended that the injury was caused by the negligence of appellee himself. A peremptory instruction was asked and refused. It is quite clear to us that the case made was one for the jury on both propositions. Under the testimony it was for the jury to say whether or not Guy was only a foreman for the Finkbine Lumber Company. Appellee had testified to this. The so-called contract introduced by the Finkbine Lumber Company, which was merely a copy of a letter written to Guy, and rehearsing what had been orally agreed to between them, does not make it clear that Guy was an independent contractor. The fact that the Finkbine Lumber Company saw fit to insure Guy's employees against accident and to collect from them the premium; the fact that they took such interest in this young man after he was hurt, offering to send him to New Orleans and Hattiesburg; the fact that they collected from this accident policy and paid to appellee half time for some little while after the accident; the fact that Finley was the general superintendent of the mill, looking after the premises, machinery, etc., and had called Guy's attention

to the condition of the mill; the fact that this superintendant would hurry appellee at his work—tended to show, at least, that they had some sort of control over Guy and his men, as well as his finished output. Under the testimony the jury were fully warranted in finding that Guy was not an independent contractor.

The testimony allowed to prove that the company carried accident insurance on Guy's employees was properly admitted. It was strong proof of the fact that appellant was in real control and that Guy was only a servant of the company.

Whether or not appellee was guilty of contributory negligence, under the facts of this case, was a question, for the jury, and they have settled it adversely to the contention of appellant. The facts in this case on the question of contributory negligence are very similar to the facts in the case of *Kneale v. Dukate*, 93 Miss. 201, 46 South. 715, and the court there held that it was a question for the jury.

It was not only the duty of the appellant to furnish the appellee with a reasonably safe place in which to work when he started at his work, but this was a continuing duty. The appellee was engaged in the manufacture of staves after the timber had been cut and handed to him. It was no part of his duty to keep the place where he was working in a reasonably safe condition, free from the accumulation of trash; but it was the ever-present duty of the master to see that this was done. Appellee testifies that because the master neglected this duty, and allowed this trash to accumulate there, he was injured while attempting to reach the oil for the purpose of oiling the saws; and if this testimony is true, which the jury have said by their verdict is the fact, there is no question as to the liability of the master.

On the question as to whether or not Guy was an independent contractor, the case of *Brower v. Timreck*, 66 Kan. 770, 71 Pac. 581, is directly in point. The facts

in the above case are very similar to the facts in this case, and the court held that the question was one for the jury. See, also, *Laffery v. U. S. Gypsum Co.*, 83 Kan. 349, 111 Pac. 498. In both of the above cases it is held that evidence that the owner held insurance indemnifying it against loss and damage from accident to laborers is competent, as tending to show the real relations between the person superintending the operation of the machinery and the owner.

Only one instruction was asked for the appellee, to which there can be no objection. Counsel for the appellant claim that the court erred in refusing instructions Nos. 3 and 5 asked for by appellant. We shall not set out these instructions in full, but in criticism of same will say that both instructions are in direct conflict with the law announced in this opinion. If the court had given instruction No. 3, it would have been virtually a peremptory instruction. Instruction No. 3 undertook to tell the jury that while it is true that it is the duty of the employer to furnish a reasonably safe place for an employee to work, still this rule does not apply to accumulation of blocks or pieces of wood in the course of work being done which are only temporarily and infrequently removed. The instruction entirely loses sight of the fact that the duty of the master to furnish a reasonably safe place is a continuing duty. This duty is not satisfied by putting the place in a reasonably safe condition once, and then allowing it to become dangerous while the servant is at his work; but it must be reasonably safe at all times. Of course, what is stated here with reference to this instruction applies to the character of case which the court has under consideration. There may be some cases in which the very work which the servant is required to do as it progresses requires him to protect himself; but the case presented by this record is not such a case. If this instruction had been given, it would have destroyed the very basis of appellee's suit.

The fifth instruction refused is bad for practically the same reason as the third instruction. The only practical difference between the third and fifth instructions is that the fifth instruction tells the jury that if they "believe from the evidence that the plaintiff reached above the saw for the oil can, and in so doing slipped upon a small block or piece of wood, and fell upon the saw, and that the fact that such piece of wood was on the floor was due to the negligent failure of some other employee to sweep it away, then there is no liability on the part of the defendant, and the jury will say so by their verdict." This instruction seeks to eliminate the non-delegable duty of the master to keep this place in a reasonably safe condition. The failure of an employee charged with this duty to keep it in that condition was the failure of the master. It was one of the master's nondelegable duties—one that he could not shift to any other employee. *Affirmed.*

Suggestion of error filed and overruled.

BRIGHT COMPTON v. STATE.

[57 South. 919.]

INTOXICATING LIQUORS. *Wrongful sale. Instructions.*

Where on the trial of accused for the unlawful sale of whiskey a witness testified for the state that he and accused had agreed that accused should order whiskey for them both from Slidell, Louisiana, and that in accordance with this agreement witness gave accused one dollar and accused ordered two quarts of whiskey, one of which he gave witness in accordance with their agreement, an instruction that if the jury believed that the witness gave defendant a dollar and about three weeks later defendant delivered to witness a quart of whiskey, he was guilty, was erroneous, since if the witness' testimony was true, defend-

ant did not sell the whiskey but simply acted as agent in effecting a purchase for the commission of which crime accused was not on trial.

APPEAL from the circuit court of Pike county.

HON. D. M. MILLER, Judge.

Bright Compton was convicted of the illegal sale of intoxicating liquors and appeals.

The indictment against appellant charged that he did "then and there unlawfully and willfully sell and retail intoxicating liquors, contrary to statute." On the trial a witness named Paris testified that he and appellant had agreed that appellant should order whisky for them both from Slidell, Louisiana, and that in accordance with this agreement he gave appellant one dollar, and appellant ordered two quarts of whisky, one of which he gave to witness Paris, in accordance with their agreement. On the trial the court gave the following instruction, at the request of the state: "No. 1. The court instructs the jury, for the state, that if you believe from the evidence in this case beyond a reasonable doubt that J. H. Paris gave defendant one dollar at Lexie, Pike county, Mississippi, during the month of June, 1910, and about three days later the defendant delivered to the said Paris one quart of whisky for said dollar near Tylertown, Pike county, Mississippi, then he is guilty, and you should so find."

E. J. Simmons, for appellant.

Instruction number two given for the state, in effect tells the jury that if they believe the testimony of J. H. Paris, appellant was guilty of retailing and the jury should so find. This instruction is not only upon the weight of the testimony, but it is not warranted by the facts in the case, and is a misconception on the part of the court of the evidence of the witness, Paris. It is so palpably erroneous that argument or citation of authority is unnecessary. *Johnson v. State*, 63 Minn. 228.

That the court below adhered to an erroneous view of this testimony is shown by his refusal of instruction number two asked by appellant to the effect that the jury could not convict unless a sale of the whisky in question was shown by the evidence, and by the further fact that instruction number three asked by appellant was modified by the court to read "or Paris," thus denying to appellant the right to have the jury determine whether there was a sale of the whisky, or whether the elements of sale had been shown by the evidence to a moral certainty.

The error committed by the court in giving instruction number two for the state above mentioned is incurable and is in palpable conflict with those given for appellant leaving the jury without any guide as to the law of the case. See in this connection 12 Cyc. 649, where it is said: "The practice of giving conflicting instructions, although not intended to be conflicting, and leaving the jury to conjecture which of them is applicable to the facts, is not favorable to the correct administration of justice."

Frank Johnston, assistant attorney-general, for appellee.

The two instructions granted for the state are simple and elementary and their correctness is too clear for argument.

I respectfully submit that the judgment of the court should be affirmed.

. SMITH, J., delivered the opinion of the court.

The granting of the first instruction requested by the state was fatal error. It omits a material portion of the testimony of the witness Paris, upon whose testimony it was predicated, which omitted portion discloses that appellant did not sell the whisky to the witness, but simply acted as his agent or assistant in effecting the

purchase thereof (*Powell v. State*, 96 Miss. 608, 51 South. 465), for the commission of which crime appellant was not on trial. The testimony of Paris, in effect, was that appellant ordered from Slidell, Louisiana, for himself and Paris, one-half gallon of whisky, one quart for each; Paris giving to appellant the money with which to pay for his portion thereof. Upon receipt of the whisky by appellant, he delivered to Paris the quart ordered for him.

The judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

CABE PARRETT v. STATE.

[58 South. 1.].

EXHIBITING DEADLY WEAPONS. Indictment. Requisites. Code of 1906, section 1110.

An indictment charging the exhibition of deadly weapons under Code of 1906, section 1110 must allege that the exhibition was "in the presence of three or more persons" as these words are essential and such defect in the indictment is not cured by evidence that three or more persons were present when accused exhibited the weapon.

APPEAL from the circuit court of Simpson county.

HON. W. H. HUGHES, Judge.

Cabe Parrett was convicted of exhibiting a deadly weapon and appeals.

The facts are fully stated in the opinion of the court.

Hilton & Hilton, for appellant.

The court said in the Traylor case, on page 523 of the opinion, under black letter, subdivision 5: "We know

of no rule of law which will justify the court in convicting a person of any crime unless the offense comes under the letter of the statute. The law is, that criminal statutes must be strictly construed. Such has been the law from time immemorial.”

We call the court's attention, also, to the fact that the indictment does not charge that this offense was committed in the presence of three or more persons, as provided by the statutes, and was, therefore, fatally defective in matter of substance. It could not be said that the appellant waived this defect, by not demurring to the indictment; it is not too late to raise the question by a motion in arrest of judgment, which was done. See the case of *Hughes v. State of Mississippi*, 74 Miss. 368. In this case the indictment did not charge that the cotton alleged to have been stolen, was the property of another, than the accused; and the court said that the defect is one of substance, and the motion in arrest of judgment should have been sustained. See, also, the case of *Thompson v. State*, 51 Miss. 353, in which the court said, “that a conviction could not be had upon an affidavit stating that the accused did shoot and wound one horse, with a gun, without charging that it was done mischievously or maliciously, no crime known to the law was committed.” In this case a motion in arrest was made, and the court held that the same should have been sustained. In the case of *Denly v. State*, 12 S. R. 698, which is not officially reported, this court said that a motion in arrest of judgment brings in question, the sufficiency of the indictment on every ground, whether specifically assigned or not. In this case Denly was indicted for selling cotton on which there was a lien, and the indictment did not aver that the money was received by reasons of, or because of the sale of the cotton. The court said that this was a constitutional defect; and while it was not specifically argued, or pointed out, even in the supreme court, yet, the supreme court, of its own motion

said the motion in arrest of judgment, brought into question the sufficiency of the indictment, and the case was reversed, and the indictment quashed. A very late utterance of this court on this question is found in 91 Miss. 250. In this case, the court said, it is a material matter, where the defendant was indicted for perjury that the indictment negative the truth of the defendant's testimony. Moore was convicted and a motion in arrest of judgment was made and overruled. Moore appealed, and the case was reversed and remanded.

We think the cases cited above are directly in point with the point involved here. Section 1110 undertakes to say, that if certain persons shall exhibit certain weapons in a certain manner, before three or more persons, he shall be guilty, etc. It is not a violation of the law for the man to get very angry and take his gun and get off in the woods by himself, and exhibit it in a rude, angry and threatening manner nor is it against the law for a man to exhibit a deadly weapon in a rude, angry or threatening manner in the presence of one person, nor two persons; but there must be three persons. We think that is one of the essential matters of substance, and it is as necessary to allege the presence of three or more persons in an indictment, as it is to allege that the weapon was exhibited, or as it is to allege that it was not in necessary self-defense, or any other of the things that goes to constitute the offense.

We think, also that the court erred in not peremptorily instructing the jury to find for the defendant when the testimony was submitted, because the indictment fails, in the first instance to charge him with any offense, and the testimony fails to show that this defendant had committed any offense, or was such person who could commit it under section 1110. And for the further reason that the indictment itself, failed to show that he exhibited the weapon in the presence of three or more persons.

Frank Johnston, assistant attorney-general, for appellee.

The other objection to the indictment made in the motion for arrest of judgment is, that the statutory offense defined by section 1110, must contain the essential qualification that the exhibition of a deadly weapon in a rude, angry or threatening manner must have been made in the presence of three or more persons. I concede that this is a statutory offense, and the charge made in the indictment should be brought within the terms, either expressly or substantially, employed in the statute.

I do not desire to present an argument to the court upon the proposition that this offense contains, as one of its essentials, the exhibition of the deadly weapon in the presence of three or more persons, but I am content to leave this question without argument, to the decision of the court.

The further question presented, however, in regard to the consideration of the motion on this ground in arrest of judgment is, whether the objection should not have been presented at the outset, and before the verdict by a motion to quash the indictment.

I am aware the rule announced by this honorable court in various cases that a motion in arrest of judgment upon the ground of a defect in the indictment, is sustainable, and is a proper mode of raising the objection in cases where the indictment itself is fatally defective in not charging an offense, known to the law.

In the case at bar, the shotgun was used, or displayed, by the appellant, not only in a rude, angry and threatening manner in the presence of at least three persons as shown by the testimony, but also it was shown that Landers, the man who was attacked by the appellant, saved himself from being shot by retreating into the house, and also by interference of the bystanders.

Upon this state of the proof, which was admitted without any objection on the part of the appellant, the ques-

tion is, whether, after the offense had been proved fully and clearly by the undisputed testimony of the eye-witnesses and this without any objection on his part, whether he can now raise this question by a motion in arrest of judgment. In this testimony as to the presence of these witnesses at the time the weapon was displayed, an objection could have been made that, being not charged in the indictment as to the presence of three or more persons at the time, the testimony was incompetent.

The question is, therefore, whether the appellant, having made no objection to the testimony, and the offense having been made out completely and satisfactorily in the evidence, under the express terms of section 1110, defining the offense, can, after the verdict, raise the question as to the sufficiency of the indictment on this point by a motion in arrest of judgment.

Argued orally by *R. T. Hilton*, for appellant.

Argued orally by *Frank Johnston*, assistant attorney-general, for the state.

McLAIN, C.

Appellant was convicted and sentenced in the circuit court of Simpson county on the charge of exhibiting a deadly weapon in a rude, angry, and threatening manner. From this judgment he appeals to this court.

The indictment charges that he, "on the — day of April, 1910, in Simpson county aforesaid, did wilfully and feloniously, in a quarrel, and not in necessary self-defense, exhibit a shotgun, a deadly weapon, in a rude, angry, and threatening manner, against the peace and dignity of the state of Mississippi." Section 1110, Code 1906, under which this indictment was drawn, recites that "if any person having a deadly weapon shall, in the presence of three or more persons, exhibit the same in a rude, angry, or threatening manner, not in necessary

self-defense," etc. The motion in arrest of judgment, filed by appellant, in substance presented the question whether the indictment charges a criminal offense under section 1110, Code 1906. The motion was overruled by the court.

Manifestly the indictment should have contained the essential qualification that the exhibition of the deadly weapon must have been made "in the presence of three or more persons." These words were left out of the indictment, and they were essential. To make a crime under this section, the exhibition of the deadly weapon *in the presence of three or more persons* is necessary, and this fact must be averred in the indictment. It is true, from the record in this case, that three or more persons were present when appellant exhibited the weapon in a rude, angry, and threatening manner, not in his necessary self-defense; but this does not supply the defect in the indictment.

We think the motion in arrest of judgment should have been sustained, and, for reasons above, we think the case should be reversed. *Reversed.*

PER CURIAM. For reasons assigned by the Commissioner, the judgment of the court below is reversed, the indictment quashed, and appellant discharged.

W. M. SIMPSON v. INTERSTATE COOPERAGE COMPANY.

[58 South. 4.]

1. CODE OF 1906, SECTIONS 4338-4326. *Tax sale. Filing deed. Time of sale.*

Where a tax collector filed a conveyance of land sold to an individual for taxes in the office of the clerk of the chancery court of the county as provided under Code of 1906, section 4338 and such deed remained there for two years from the date of sale, not being sooner redeemed. Such deed being in a vault in the chancery clerk's office and remaining therein after the destruction of the court house by fire, the vault not being destroyed, this was a sufficient compliance with the statute.

2. TAXATION. *Tax sale. Time of sale. Code of 1906, sections 4326-4328.*

A sale of land by the tax collector for unpaid taxes on the first Monday of March as provided for under section 4328, Code of 1906, is valid, although section 4326, Code of 1906, provides that a tax collector shall advertise all lands in his county on which taxes have not been paid on the first Monday of April following, since the requirements of section 4326 are not necessary to be observed to have a valid sale.

APPEAL from the chancery court of Tallahatchie county.

HON. M. E. DENTON, Chancellor.

Bill by the Interstate Cooperage Company against W. M. Simpson to set aside a tax deed. From a decree for plaintiff defendant appeals.

The Interstate Cooperage Company purchased the land in controversy on September 6, 1906. The taxes for 1906 not having been paid, the land was on March 4, 1907, sold for taxes, and purchased by appellant Simpson. After the expiration of two years, the appellee, learning that the property had been sold at a tax sale, filed its bill in chancery, tendering the taxes, interest,

and penalties, and sought to have the tax deed to appellant set aside and removed as cloud upon appellee's title. The chancellor granted the relief prayed, and annulled appellant's title, and this appeal is prosecuted.

Two questions are presented for determination: First. Whether the tax sale was made at the proper time; that is to say, whether it should have been made on the first Monday of March or the first Monday of April, there being a conflict in the provisions of section 4326 and 4328 of the Code of 1906. The next question presented is whether the deed remained on file in the chancery clerk's office two years, as required by section 4338. It seems that the courthouse was destroyed by fire after this deed was filed, and temporary quarters were arranged in the town for the chancery clerk's office. The vault in the courthouse was not destroyed, and this deed, with certain other records of the office, remained in the vault, which the clerk continued to use.

May & Sanders, for appellant, filed an elaborate brief, too long for publication, in which they contended:

1st. That the sale for taxes by the tax collector on the first Monday of March, 1907, was made at the proper time, citing Code of 1906, sections 2933, 4326, 4328, 4338; *Vassar v. George*, 47 Miss. 713; Laws of 1908, p. 208; Laws of 1910, p. 215; *Bobo v. Commissioners*, 92 Miss. 792.

2d. That the conveyance to appellant was filed in the office of the chancery clerk of the second district of Tallahatchie county on or before the first Monday of April, and did there remain for two years from the day of sale within the meaning of section 4338, Code of 1906, citing "Words and Phrases," vol. 3, p. 2765; *Reed v. Inhabitants of Acton*, 120 Mass. 130; *Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494; *Snyder v. Methoin*, 60 Tex. 487; *State v. Hackaway*, 12 S. W. 246; 98 Mo. 590; *Meridian National Bank v. Hoyt Bros. & Co.*, 74 Miss.

221, 21 So. 12, 36 L. R. A. 796, 60 Am. St. Rep. 504; *Edmondson v. Granberry*, 73 Miss. 723.

Thomas M. Scruggs, for appellee.

I believe that the serious inquiry in the case is: Was the sale for taxes 1906, March 4, 1907, regular; and, if so, was the tax deed filed in the chancery clerk's office and did it there "remain for two years from the day of sale?"

The Code of 1906 contains the following provisions in respect to the advertisement and sale of property for taxes:

"Section 4326 . Sale of Land for Taxes: Advertisement.—After the 15th day of January the tax collector shall advertise all lands in his county on which the taxes have not been paid or which is liable to sale for other taxes, for sale, at the door of the court house of his county, on the first Monday in April following. Such advertisement shall be inserted for three weeks in some newspaper published in the county, if there be one, but in counties having two court districts the land shall be advertised and sold in the district in which said lands are situated, and be put up at the courthouse door, and shall contain a list of the lands to be sold in numerical order as they are contained in the assessment roll, in substance as follows: . . . or by such other designation as it may be assessed. Land in cities and towns shall be described in the advertisement as it is described on the assessment rolls."

Section 4328. How Sale made.—On the first Monday of March, if the taxes remain unpaid, the collector shall proceed to sell the land, or so much and such parts of the land of each delinquent taxpayer as will pay the amount of taxes due by him, and all costs and charges, to the highest bidder for cash. He shall first offer forty acres, and if the first parcel so offered does not produce the amount due, then he shall offer another similar subdivi-

sion, and so on until all of the land constituting one tract and assessed as the property of the same owner be offered. The sale shall be continued from day to day, within the hours for sheriff's sales, until completed; but neither a failure to advertise nor error in conducting the sale shall invalidate a sale at the proper time and place for taxes of any land on which the taxes were due and not paid; but a sale made at the wrong time or at the wrong place shall be void, and any person sustaining damage by reason of any failure or error of the tax collector may recover damages therefor on his official bond."

It is respectfully submitted to the court that this sale should have been on the first Monday in April, 1907, and not upon the first Monday in March, and this view is fortified by the subsequent legislation upon the subject by act approved February 1, 1908, being chapter 199 of the acts of that year, being:

"An Act to Amend Section 4328 of the Code of 1906 in regard to the time the tax collector shall sell lands on which the taxes have not been paid," by which act the date for the sale is fixed for the first Monday in April.

This act was followed in 1910 by an amendment to section 4338 by an act entitled:

"An act to amend section 4338 of the Code of 1906, so as to change the time for the tax collectors to file conveyances of land sold to individuals from the first Monday in April to the first Monday in May." Approved April 16, 1910.

The proof shows that the court house at Sumner, in which the clerk of the chancery court maintained his office, was destroyed by fire September 4, 1908, and the board of supervisors of the county provided him an office elsewhere, Mr. Ward's office; that all the papers, books, and documents of the office were removed to the place so provided, except some unused books and papers were left in the vault of the ruined court house; that

these were in a measure protected from the weather by being in certain metallic furniture in the vault; that the court house walls were dangerous and all officers abandoned it, securing offices elsewhere under the orders of the board of supervisors, who also designated another building the court house.

The tax deed in question was left by the clerk in the burned court house in a metallic case. This vault stood open and was visited by any one who chose to do so; was in fact used somewhat as a storage place, in the particular custody of no one, until about the first day of February, 1909, when the premises were taken in charge by the contractors who rebuilt the court house.

On February 10, 1909, the building to which the chancery clerk's office was removed was destroyed by fire and all of the books, papers and documents pertaining to the office, consumed except the tax deed in question and a few other documents left stored in the old vault.

After the second fire, occurring February 10, 1909, the chancery clerk's office was by the board of supervisors removed to Mr. Simpson's building, but the deed in controversy remained in the old vault in the ruined and abandoned court house until it was delivered to appellant after the period of redemption had expired.

Under the proof it appears that the chancery clerk's office was established and maintained in the court house up to the fourth day of September, 1908; from September 4, 1908, to February 10, 1909, in Mr. Ward's office in the town of Sumner, and from February 10, 1909, until April 1910, in Mr. Simpson's building in the town of Sumner. In April, 1910, it was re-established in the court house which had been rebuilt in the meantime. No suggestion is made that the tax deed in controversy followed the changes in the location of the clerk's office, but the proof tends to show that during all these changes in the clerk's office above mentioned it remained in the old vault in the ruined court house. This does not com-

ply with the requirements of the law by which it is provided that:

“The tax collector shall file all conveyances of land sold to individuals in the office of the clerk of the chancery court of the county on or before the first Monday in April, there to remain for two years from the day of sale, unless the land be sooner redeemed.” Code, 1906, Section 4338.

Construing this provision of the code it was held by this court that the deed must be lodged in the proper custody—that is, in the chancery clerk’s office—and there remain for two years from the day of sale. It need not be marked filed, or the record of its lodgment noted, but it must be so lodged and there remain undisturbed for two years. The statute does not say or mean that the deed must be under the care, control or dominion of the clerk, but shall remain in his office.

It is earnestly insisted that the clerk can maintain but one office, or official place of business, at a given time. It is argued by counsel for appellant that he may maintain two places at the same time, the place officially designated by the board of supervisors—the Ward building—and the old vault in the court house. If he may maintain two places, he may maintain any number; in fact, he may justly claim that all places where he may see fit to keep any part of his papers or the documents pertaining to his office is thereby made his office within the meaning of the law. If the argument advanced by appellant that the deed in controversy was in the official control or custody of the clerk, the requirements of the law are satisfied, the clerk could have kept the deed upon his person, in another county, or another state, and yet have it in his custody and under his control.

Argued orally by *Geo. W. May*, for appellant.

Argued orally by *Thomas M. Scruggs*, for appellee.

MAYES, C. J., delivered the opinion of the court.

On the first Monday, the fourth day of March, 1907, the land in controversy was sold for taxes for the year 1906 and purchased by appellant. After the land was sold to appellant by the tax collector, the deed was filed in the office of the chancery clerk of the county, as required by section 4338 of the Code of 1906. As to this feature of this case the controversy turns upon the question of whether or not the delinquent tax land should have been sold on the first Monday of March, as required by section 4328 of the Code of 1906, or whether the sale should have taken place on the first Monday of April, the time at which section 4326 of the Code of 1906 requires the advertisement to state that the sale of delinquent tax land shall take place.

After this land was sold for delinquent taxes on the first Monday in March, 1907, and after the tax collector had filed the deed in the office of the chancery clerk, as required by section 4338 of the Code of 1906, the courthouse, in which was the chancery clerk's office, was destroyed by fire on September 4, 1908. At the time of this fire the tax deed in question was on file with the clerk in a vault in the chancery clerk's office. After the fire temporary quarters were provided for the clerk's office elsewhere by order of the board of supervisors; but the chancery clerk continued also to use the vault, and this particular deed was left in this vault with other records and papers of the chancery clerk's office, all of which were in the actual custody of the clerk and on file in his office, within every intendment of section 4338 of the Code of 1906, where it remained for the full period of time required by the section. We do not deem it worth while to dwell on this feature of the case. The facts make it clear that the clerk continued the use of this vault as a part of his office, leaving on deposit there this and many other records, and had appellees applied to the clerk for the redemption of this land, or for inspection of this tax conveyance, at any time within the

two years, they would have found this deed in his custody.

The actual sale of the land was made on the first Monday of March, as is required by section 4328 of the Code of 1906, and this section of the Code necessarily controls section 4326. Section 4326 of the Code of 1906 provides how lands shall be advertised for sale and the date on which *the advertisement* shall state that the lands shall be sold; but section 4328 provides the date when the sale shall take place, and further provides that "neither a failure to advertise nor error in an advertisement," etc., shall invalidate the sale. The sale of this land was made at the time the law required. There is hopeless conflict between sections 4326 and 4328 of the Code. Section 4326 requires that "the tax collector shall advertise all land in his county on which the taxes have not been paid, or which is liable to sale for other taxes, for sale at the door of the courthouse of his county on the first Monday of April following," while section 4328 requires that "on the first Monday of March, if the taxes remain unpaid, the collector shall proceed to sell the land," etc. The date of sale being fixed by statute, the advertisement of sale, in view of the fact that the sale is good without it, is of little practical value, beyond merely calling the attention of the public to those standing on the roll as delinquents, thus, perhaps, bringing notice to delinquents who have forgotten to pay their tax.

Section 4328 of the Code is necessarily controlling: for, if this were not true, the court would be compelled to hold that the failure to do that which the statute declares not to be essential to a valid sale would control section 4328, and make invalid a sale made under it for the failure to do that which the statute says is not necessary in order to make a good sale. This confusion in the law has fortunately been eliminated by amendments of 1908 and 1910.

This case is reversed, and the bill dismissed.

Reversed and dismissed.

JAMES DIXON v. STATE.

[58 South. 5.]

CRIMINAL LAW. *Disqualified jurors. Reversible error.*

Where a defendant on trial for crime uses every peremptory challenge allowed him by law, it is fatal error for the court to overrule his challenge of disqualified jurors for cause.

APPEAL from the circuit court of Yazoo county.

HON. W. A. HENRY, Judge.

James Dixon was convicted of manslaughter and appeals.

The facts are sufficiently stated in the opinion of the court.

Holmes & Holmes, for appellant, filed an elaborate brief, too long for publication, contending that under the evidence in this case appellant should have been granted a change of venue and that the lower court erred in not sustaining appellant's challenge of jurors for cause after his peremptory challenges had been exhausted. *Peoples v. Yoakum*, 53 Cal. 571; *Safford v. State*, 76 Miss. 258; *Tennison v. State*, 79 Miss. 708; *Brown v. State*, 83 Miss. 645; *Anderson v. State*, 46 So. 65; *Fugate v. State*, 82 Miss. 195; *Murphy v. State*, 92 Miss. 203; *Jeffries v. State*, 74 Miss. 677.

Jas. R. McDowell, assistant attorney-general, for appellee.

Under our constitution, every person charged with crime is entitled to a fair and impartial trial. Jurors should not only be competent, but fair and impartial. However, the fact that a juror had heard the case discussed or has formed an opinion, does not necessarily

disqualify him. Section 2685, of the Code of 1906, is as follows:

“Any person, otherwise competent, who will make oath that he is impartial in the case, shall be competent as a juror in any criminal case, notwithstanding the fact that he has an impression or an opinion, as to the guilt or innocence of the accused, if it appear to the satisfaction of the court that he has no bias, or feeling, or prejudice in the case, and no desire to reach any result in it, except that to which the evidence may conduct; but any juror shall be excluded, if the court be of opinion that he cannot try the case impartially, and the exclusion shall not be assignable for error.”

To a large measure the qualifications of a juror under this section are left to the sound discretion and good judgment of the trial judge, subject of course to review by the highest tribunal.

Before going into the testimony of the jurors on their *voir dire* examination in the instant case, I will call attention to a few cases decided by our court where jurors were held to be competent, even though they had heard much of the cases, and had formed opinions.

In *Green v. State*, 72 Miss. 522, our court held, speaking through Chief Justice Cooper, said that:

“Under said statute one is not incompetent as a juror merely because, on his *voir dire*, he states that he lives in the immediate neighborhood where the crime was committed, had heard it discussed, and had formed an opinion as to the guilt or the innocence of the accused of such a fixed character that it would require evidence to remove it, provided that he makes oath that he can try the case fairly and impartially, according to the evidence.”

In *Gammons v. State*, 85 Miss. 103, the *Green* case was approved. In a very exhaustive opinion written by Judge Truly, and I ask a careful reading of Judge Truly's opinion as it goes into the testimony taken on

the *voir dire* examination, and in my opinion, the jurors in the case at bar are qualified according to the announcement in the Gammons case.

The court recently through Commissioner McLain approved the *Green case, supra*, in the case of *Whitehead v. State*, 52 So. 259.

And the court speaking through Judge Mayes, has recently approved, the *Gammons case, supra*, in the case of *Cook v. State*, 43 So. 618. See syllabus No. 7, and the exhaustive opinion of Judge Mayes, and authorities there cited.

The Gammons case was again approved in the *Evans case*, 40 South. 8.

It was held in *Helm v. State*, 67 Miss. 562, that:

“One who has no hostility to the accused, and who is not shown to be biased by a preconceived opinion as to render him incompetent as a juror, is not disqualified, though he may have a bad opinion of the defendant’s character.”

It will thus be seen that our courts lay down a doctrine which must set a high standard for jury service. It has been a matter of favorable comment all over the country that in Mississippi one does not have to be a fool to do jury service. Any juror who can read vivid accounts of a homicide, and hear it discussed on the streets, and then swear that he has no opinion, is either a knave or a fool. Our legislature recognized the desirability of having good men on the jury, and therefore enacted the statute which provides that an opinion formed or expressed will not disqualify one for jury service, if the court is of opinion, by his answers to questions, that he will be fair and impartial, and if he swears that he will. I believe that a court of review should scrutinize the testimony of jurors with great care so that a fair and impartial jury guaranteed by the constitution, will be had in fact. But I submit in the case at bar that every single one of the men who sat upon this jury come clearly

within the qualifications laid down in the Green case, and followed many times since by our court.

The defendant exhausted all of his peremptory challenges and was allowed one additional challenge, which he also took advantage of, and exhausted.

Argued orally by *J. G. Holmes*, for appellant.

Argued orally by *Jas. R. McDowell*, assistant attorney-general, for state.

MAYES, C. J., delivered the opinion of the court.

After a most thorough examination of this record, it is our view that the jurors Cheatham, Wilson, Childress, and Pierce were disqualified as jurors, and the trial court should have sustained the challenge for cause. Every peremptory challenge allowed appellant under the law was used, and therefore the failure on the part of the court to sustain the challenge for cause of any one of these jurors was fatal error. Nothing is to be gained by setting out in full the questions and answers of the jurors above specified. The answers were frank and fair, but clearly show disqualification. Questions of this character largely depend upon the facts of each particular case. *Murphy v. State*, 92 Miss. 203, 45 South. 865. This case is controlled by the cases of *Jeffries v. State*, 74 Miss. 675, 21 South. 526, *Fugate v. State*, 82 Miss. 189, 33 South. 942, and *Murphy v. State*, 92 Miss. 203, 45 South. 865, and cases cited in above opinions.

In reversing this case, we deem it proper to say that, in the light of the whole record, the trial court should grant a change of venue, if asked, when the case comes on for trial again.

Reversed and remanded.

McLEAN, J. (specially concurring). The record in this case is a striking illustration that "truth is stranger than fiction," and "how unsearchable are the judgments

of God, and His ways are past finding out.” The appellant, during a drunken debauch, being tanked up on “blind tiger” liquor, and meeting an old negro man, pulled out his pistol and said to him, “Old nigger, you don’t think I’ll shoot,” and the negro replied, “Yes, white man; I know you will, if you say so;” and appellant, repeating this once or twice, pointed the pistol towards the ground, somewhat to the side of the negro, and pulled the trigger. The pistol fired, the ball probably striking a tin can, or some other hard substance, ricocheted, and just at that moment a young lady stepping out upon the gallery of a nearby house, was struck in the forehead by this glancing ball, and instantly killed. The appellant was unpopular, with scarcely any friends, and without influence, brought about, no doubt, by the demoralizing use of liquor. The appellant went home without knowing that he had injured any one, and when the officer arrested him, which was a very short time thereafter, the appellant was found in a drunken stupor. The father of this young lady was influential and popular, a gentleman of culture, and a prominent office holder of his county. It is gleaned from the record that his daughter, who met her sad and untimely death by this stray bullet, was beautiful, accomplished, and refined, a favorite in her community, and, standing upon the very threshold of her young womanhood, with all the freshness and fragrance of youth around her, there were many rainbows in her sky and fancy colored every object with its gorgeous tint. The news of this tragedy quickly spread. The newspapers of the county appeared with sensational headlines and inflammatory editorials, not only condemning the crime, but called down the most direful punishment upon the head of this rowdy, drunken defendant. The inevitable result followed. The community, and we may add justly so, was stirred with indignation to its profoundest depths. Threats of lynching and mob violence were heard to such an extent that

the deputy sheriff, being apprehensive that his prisoner would be taken from jail and mobbed, thought it advisable to carry the appellant, for safe-keeping, to an adjoining county. Within two or three months thereafter the grand jury assembled, and very promptly returned an indictment, charging appellant with murder. A motion for a change of venue was made by defendant, upon the ground that, owing to the state and condition of the public mind and the undue prejudice existing against him, he could not secure in that county a fair and impartial trial. This motion was overruled, and the defendant forced to trial for his life. The court went through the solemn form of trying this man for murder, when there was not one element of murder in the case. He was convicted of manslaughter, and sentenced to the penitentiary for ten years. This is a tragedy, and this the scene.

Without going into a discussion of the evidence produced on the motion for a new trial, it is sufficient to say that, under the circumstances, it was practically impossible for this defendant to have obtained what the law regards as a fair and impartial trial, and the motion for a change of venue should have been sustained. Before the jury was secured the appellant had exhausted his peremptory challenges, and there were forced upon him some three, and perhaps four, jurors who were permitted to sit upon the jury over the protest of the defendant. These jurors stated upon their *voir dire* that they had a fixed opinion, that it would require evidence to remove this opinion, and that, if they were called upon to pass upon the case without any evidence, their minds were in a condition to then return a verdict. These jurors were perfectly honest and frank in their statements, stating that they did not consider themselves competent jurors, but that they would return a verdict according to the law and the evidence. To try any man with a jury composed of men who have formed such an opinion

is in the eye of the law no trial. It is more of a form than a trial; and, no matter how guilty a person is, he cannot be considered guilty unless he has been tried and convicted according to the rules of law. Every one, regardless of station or circumstances, regardless of the crime charged, is entitled to a fair and impartial trial. The Constitution so declares. Every principle of justice and right so proclaims. The law is blind. It does not and cannot see any distinction between the influential and the lowly, between the popular and the unpopular, between wealth and poverty, between strength and weakness, between the master and the servant, between the white and the black, but, like the sunshine from heaven, sheds its radiance upon all alike, and beneath its protecting aegis all can gather when the storms of passion, prejudice, and indignation arise, causing reason to desert its post and mania to seize the helm; in fact, to try one at such a time and place and by such a jury destroys the very palladium of the rights and privileges of the American citizen.

W. C. ELLIS & Co. v. WM. WALKER ET AL.

[58 South. 97.]

1. HUSBAND AND WIFE. *Estate conveyed. Estate of entirety. Survivorship.*

Where a deed was executed in the year 1861 conveying lands to a husband and his wife, under the law then in force, it conveyed to them an estate by entreties and consequently on the death of either the other became the sole owner and may convey the fee of the land therein described.

2. SAME.

In such case the fact that the word "his" is used instead of "their" in habendum clause is immaterial as this was merely a clerical error.

APPEAL from the chancery court of Simpson county.

HON. R. E. SHEEHY, Chancellor.

Suit by Wm. Walker et al. against W. C. Ellis & Company et al. From a decree for plaintiff, defendant appeals.

This suit was commenced by bill in chancery by the appellees. The bill alleged that the land in question was conveyed by W. P. Smith to Elias Smith and Margaret Smith, his wife, on July 1, 1861; that the grantees occupied the property as a homestead for a short while, when Elias Smith joined the Confederate army and afterwards died in a hospital, about the year 1865; that at the time of his death, he left his widow, Margaret Smith, and three infant children—Tobitha, who afterwards married J. W. Adcock, Nancy, who married a Mr. Walker, and Margaret, who married a Mr. Womack; that said Tobitha died intestate, leaving as her heirs at law her husband, J. W. Adcock, and seven children; that Mrs. Nancy Walker died intestate, leaving three children, her husband having died; that Mrs. Womack is still living; that J. W. Adcock and his wife, who was the oldest daughter, moved upon this property about the year 1887, and occupied it continuously for about fifteen years, and that while living upon the place, Mrs. Margaret Smith, the widow of Elias Smith, lived with them; that Mrs. Tobitha Adcock died about the year 1895; that said J. W. Adcock had, in 1899, sold the timber on said land to Eastman-Gardner Lumber Company, and afterwards sold the land in question to W. C. Ellis & Company, in 1908, both of whom, together with J. W. Adcock, are made parties defendant to the bill. The prayer of the bill is for a cancellation of the deeds from Adcock to the other defendants. and for damages for the timber removed, and for sale of the property and division of the proceeds.

The deed executed by W. P. Smith to Elias Smith and wife is as follows: "State of Mississippi, Simpson

county. This indenture, made and entered into this July 1, A. D. 1861, between Wm. P. Smith, of the first part, and Elias Smith and Margaret Smith, his wife, of the second part, all of the state of Mississippi, witnesseth: That said party of the first part, for and in consideration of the sum of three hundred dollars to him in hand paid, the receipt of which is hereby acknowledged, have this day granted, bargained, sold, and by these presents do grant, bargain, sell, unto said party of the second part and to his heirs and assigns, all our right and title and interest in the following tract of land or parcel of land lying and being situated in said county and state: The west half of the southwest quarter and the southeast quarter of the southwest quarter of section thirteen in township ten north, of range 17 west, containing one hundred and eight acres, more or less—to have and to hold the same to him, said party of the second part, his heirs and assigns, and against the said party of the second part, his heirs, executors, and administrators, and against any and all persons claiming or to claim the said by or under the state of Mississippi. In testimony whereof I set my hand and affix my seal the day and year above written. [Signed] W. P. Smith.”

It is the contention of the complainants, the widow, Mrs. Margaret Smith, Mrs. Womack, and the children of Mrs. Walker and Mrs. Adcock, that this conveyance vested title only in Elias Smith, and that his wife had only her dower interest in the property, with remainder over to her children. In the bill the widow waives her right of dower. It is contended that the three children and their heirs at law, therefore, own respectively a third interest in said property, and that therefore the conveyances by J. W. Adcock, are void, except as to his interest (one twenty-fourth) as an heir at law of his said wife.

The defendants answer the bill, denying that complainants have any interest at all in the property, for the

reason that, Mrs. Margaret Smith being a joint tenant with Elias Smith at the time of his death, his interest in the property descended to her in entirety under the Code of 1857 then in force, and that thereafter she became the sole owner of the premises, and that thereafter, in the year 1888, Margaret Smith deeded this property to J. W. Adcock. Said deed is as follows: "Know all men by these presents that I, Margaret Smith, for and in consideration of the natural love and affection which I have and do bear towards my beloved son-in-law, J. W. Adcock, have this day given and granted and delivered, and by these presents doth give, grant, and deliver, unto my said son-in-law the following property to-wit: W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 13, township 10 north, of range 17 west, containing one hundred and eight acres, more or less to have and to hold the same, and to his heirs and assigns, forever, for the purpose of taking care of me while I live here on this earth, and that it shall be his property hereafter. To have and to hold the same unto my said son-in-law and to his heirs and assigns forever." Since she had conveyed it to J. W. Adcock, his ownership at the time of the conveyances to the other defendants was absolute, since he continued to occupy the land under said deed and had it assessed in his own name, paying taxes thereon and exercised all the rights of ownership without dispute, for more than ten years.

Shannon & Street, for appellant.

We first contend that the deed executed by W. P. Smith, the patentee, to Elias Smith and Margaret Smith, his wife, on July 1, 1861, did not create a joint tenancy in Elias Smith and his wife, Margaret Smith, but under the Code of 1857 made them "tenants of the entirety."

We think the above deed states who the grantees are without any doubt, namely, "Elias Smith and Margaret Smith, his wife, party of the second part." We think

the deed was carelessly drawn, but we think it clearly states who are to be the grantees. If Elias Smith and Margaret Smith, his wife, are the grantees, as we contend, there is no conflict as to the law controlling at the time of the execution of the deed as well as the death of Elias Smith, which occurred about 1867. The Code of 1857 was in effect at that time and has been repeatedly construed by this court. See *Taylor v. Stone*, 13 S. & M., 652; *Hemingway v. Scales*, 42 Miss. 97, Am. Dec. 425; *McDuff v. Beauchamp*, 50 Miss. 531. Section 1197 of the Code 1880, which removed the common law disabilities of married women, does not apply to conveyances prior to the adoption of the Code of 1880. *Gresham v. King*, 65 Miss. 387; 4 So. 120.

We contend that upon the death of her husband, Elias Smith, the wife, Margaret Smith, became seized and possessed of the entire interest in said land, and had a full and complete title to all of the land, instead of only a life's estate (as contended for by counsel for appellant and as held by the lower court). See the last four named authorities.

If the said Margaret Smith became seized and possessed of the entire estate in the three forties in litigation on the death of her husband, the said Elias Smith, it but follows that when she sold and conveyed said land to defendant, J. W. Adcock, in 1888 she conveyed to him full title and it vested in said Adcock a complete legal and equitable title to the said three forties, and "nothing remained in the grantor except the possibility" of a reverter or right of entry upon a condition broken. This deed is Exhibit "A" to defendant Adcock's answer. *Memphis & R. Co. v. Neighbors*, 51 Miss. 412; 2 Miss. Dig., 865.

D. C. Enochs, for appellee.

SMITH, J., delivered the opinion of the court.

The deed from William P. Smith to Elias Smith and Margaret Smith, his wife, executed in July, 1861, which the reporter will set out in full, under the law then in force, conveyed to them an estate by entireties, and consequently at the death of the husband the wife became the sole owner of the land therein described. *Hemingway v. Scales*, 42 Miss. 1, 97 Am. Dec. 425, 2 Am. Rep. 586; *McDuff v. Beauchamp*, 50 Miss. 531. It is true that in referring to the heirs and assigns of the grantees in the deed they are described as his heirs and assigns; but this was evidently a clerical error, and, at most, can only be said to make the deed ambiguous. The grantees, however, are specifically designated in the deed, and it is hardly possible that the grantor intended to eliminate one of them by merely using the masculine pronoun "his" in referring to the heirs and assigns, instead of the pronoun "their." There are several errors of this character in the deed. It recites that "the grantor do grant, bargain, and sell," etc., "all our right, title," etc., and warrants the title against all parties claiming through and under them.

This being true, the deed executed by Margaret Smith, after the death of her husband, to J. W. Adcock, vested in him the fee to the land. Counsel for appellees in their brief seem to argue that this deed to Adcock should be canceled for the reason that he failed to comply with his contract to support the grantor therein. But this question does not arise, for the reason that the bill was not filed for that purpose and contains no reference to this deed at all. It was filed on the theory that appellees were entitled to a partition of the land, for the reason that it was owned by Elias Smith at his death in fee, and that they (appellees) were his legal heirs.

The decree of the court below is reversed and the cause dismissed.

Reversed.

ODD FELLOWS BENEFIT ASSOCIATION v. CELIA SMITH.

[58 South. 100.]

1. MUTUAL BENEFIT INSURANCE. *Forfeiture of policy. Nonpayment of dues. Principal and agent. Unauthorized act of agent. Effect on principal. Waiver. Knowledge by principal. Custom of local agents.*

Where the Constitution and by-laws of a mutual benefit association provides that a member who does not pay a monthly assessment by the 15th day of the month in which it becomes due shall *ipso facto* forfeit his membership in the association and his policy become cancelled, a certificate was forfeited where the monthly dues were not tendered until after insured's death which occurred after the 15th of the month.

2. PRINCIPAL AND AGENT. *Unauthorized act of agent. Effect on principal.*

The acts of an agent in excess of his real or apparent authority are not binding upon his principal.

3. SAME.

The limitations upon the authority of an agent, known to persons dealing with him, are binding upon such person, and they can acquire no rights against the principal by dealing with the agent contrary thereto.

4. SAME.

In determining whether the limitations placed by the principal on his agent's authority have been waived by reason of a custom of the agent to act in violation thereof, one of the essential facts to be determined is whether or not such custom on the part of the agent was known to, and acquiesced in, by the principal.

5. MUTUAL BENEFIT INSURANCE. *Knowledge of Constitution and by-laws.*

The secretary of a local lodge of a mutual benefit association is its agent for the purpose of collecting its monthly assessments and his authority to do so is derived from and limited by its Constitution and by-laws with notice of which assured is charged for the reason that they constitute a part of his contract of insurance.

6. MUTUAL BENEFIT INSURANCE. *Waiver of forfeiture. Custom of local agents.*

Where it is not shown that any general officer of a mutual benefit association had any knowledge that its local agents habitually accepted dues after they were due under its Constitution and by-laws, the association did not acquiesce, in such custom, so as to waive a forfeiture of the contract of insurance for nonpayment of dues in time.

APPEAL from the circuit court of Lauderdale county.
HON. J. L. BUCKLEY, Judge.

Suit by Celia Smith against the Odd Fellows Benefit Association.

From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Cassedy & Butler, for appellant, filed an elaborate brief too long for publication contending:

1st. That the custom and course of dealings upon which assured relied did not work an estoppel, and,

2d. That assuming that a custom and course of dealings was shown with reference to the acceptance of past due assessments by the local secretary that this does not work an estoppel under the facts in this case, citing: *Cooley's Briefs on Insurance*, 2496-2499 and 2502-2504; *Bacon, Ben. Soc.*, 434; *Harvey v. Grand Lodge*, 50 Mo. App. 473; *Graves v. Modern Woodmen*, 85 Minn. 396; *Elder v. Grand Lodge*, 79 Minn. 468; *Royal Highlanders v. Scovell*, 66 Neb. 213, 4 L. R. A. (N. S.) 421; *Field v. National Council*, 64 Neb. 226; *Knights of Honor v. Oeters*, 95 Va. 610; *Bargrafe v. Knights of Honor*, 22 Mo. App. 127; *Williams v. Relief Assn.*, 89 Me. 158; *Chadwick v. Triple Alliance*, 56 Mo. App. 463; *Knights of Honor v. Keener*, 6 Tex. Civ. App. 267; *Knights of Honor v. Jones*, 69 N. E. 718; *Lavin v. Grand Lodge*, 78 N. W. 325; *United Moderns v. Pike*, 76 S. E. (Tex.) 774; *Adams v. Grand Lodge*, 92 N. W. 588; *Doyle v. Royal Circle*, 99 Mo. App. 349; *Woodmen v. Rothschild*, 15

Tex. Civ. App. 463; *Supreme Council v. Taylor*, 121 Fed. 66; *Lewis v. Mutual Life Ins. Co.*, 44 Conn. 72; *Thompson v. Knickerbocker Insurance Co.*, 104 U. S. 256; *Hartford Life Insurance Co. v. Unsell*, 144 U. S. 349; *Morgan v. Jacobs*, 90 Miss. 872; *Association v. McConico*, 53 Miss. 233; *Rivara v. Insurance Co.*, 62 Miss. 720; *Morgan v. Jacobs*, 90 Miss. 864; *Railroad Company v. Swanson*, 92 Miss. 485; *Busby v. Railroad*, 90 Miss. 13; *Robinson v. Thompson*, 74 Miss. 847; *Everman v. Herndon*, 71 Miss. 823; *Crossman v. Mass. Ben. Assn.*, 143 Mass. 435; *Harvey v. United Workmen*, 50 Mo. App. 472; *Mutual Life Ins. Co. v. Girard*, 100 Pa. St. 172; *Marston v. Life Ins. Co.*, 59 N. H. 92; *Knights of Honor v. Jones*, 69 N. E. 218; *Smith v. Life Ins. Co.*, 63 Fed. 772; *Lantz v. Life Ins. Co.*, Pa. St. 546, 10 L. R. A. 577; *Helme v. Philadelphia L. Ins. Co.*, 61 Pa. 107; *Rapp v. Palmer*, 3 Watts. 178; *Want v. Blunt*, 12 East. 183; *Lycoming F. Ins. Co. v. Rought*, 97 Pa. 415; *Hummel's App.*, 78 Pa. 293; *Washington Mut. F. Ins. Co. v. Rosenberger*, 84 Pa. 373; *Crawford County Mut. Ins. Co. v. Cochran*, 88 Pa. 230; *Pritchard v. Merchants & T. L. Assur. Soc.*, 3 C. B. N. S. 622; *Mutual Ben. L. Ins. Co. v. Ruse*, 8 Ga. 534; *Marvin v. Universal L. Ins. Co.*, 85 N. Y. 282; *Dean v. Aetna L. Ins. Co.*, 62 N. Y. 642; *Tennant v. Travelers' Ins. Co.*, 31 Fed. 322; *Church v. La. Fayette F. Ins. Co.*, 66 N. Y. 222; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841; *Phoenix Mut. L. Ins. Co. v. Dester*, 106 U. S. 30, 27 L. Ed. 65; *Universal F. Ins. Co. v. Block*, 109 Pa. 535, 1 Cent. 554; *Lebanon Mut. F. Ins. Co. v. Humes*, 113 Pa. 591, Cent. 211; *Morgan v. Jacobs*, 90 Miss. 872; *Reisz v. Supreme Council*, 103 Wis. 432; *Beaty v. Mut. L. Assn.*, 93 Fed. 747.

Cochran & McCants, for appellee.

The sole question presented to the court for its determination by the record in this case is the question of

a waiver as to the time of the payment of the monthly assessments. The verdict of the jury eliminated all issues of fact, and we deem it wholly unnecessary to file any extended brief.

In addition to the authorities in the cases decided by our own court, which we will refer to later, the following authorities hold that in matters of collecting and remitting assessments and waiving of forfeitures, the secretary of the local lodge in the instant case was the agent of appellant. *Modern Woodmen v. Coleman*, 64 Neb. 162; *Supreme Lodge K. of P. v. Withers*, 177 U. S. 260; *Supreme Tribe of Ben Hur v. Hall*, 79 Am. St. Rep. 262; *Coverdale v. Royal Arcanum*, 193 Ill. 91; *Supreme Lodge K. of H. v. Davis*, 26 Col. 252; *Whiteside v. Supreme Conclave*, 88 Fed. 275; *Beil v. Supreme Lodge, K. of H.*, 80 N. Y. Supp. 751; *Grand Lodge, A. O. U. W., y. Leachman*, 199 Ill. 140; *Couberen v. Ancient Order of Pyramids*, 98 Mo. App. 243; *Seehorn v. Supreme Council, C. K. of A.*, 95 Mo. App. 233; *McDonald v. Supreme Counsel, O. of C. F.*, 78 Cal. 49; *Modern Woodmen v. Jameson*, 48 Kan. 718.

"A stipulation in an insurance policy limiting the powers of its agents in respect to waivers of conditions and forfeitures is not a limitation of the power of the company to contract or to abrogate or to modify contracts or conditions intended for its exclusive benefit. It is nothing more nor less than a reservation for the benefit of the company which it may waive." Cooley's Briefs on Ins., p. 2506, and authorities cited.

"A waiver of the stipulation limiting an agent's authority need not be in express terms. The stipulation may be and often is waived by an habitual course of dealings which shows that it is not intended that the rule as written shall control but that the agent's real authority extends beyond that which is declared in the policy." Cooley's Briefs on Ins., p. 2507, and authorities cited.

“It is said that a stipulation limiting the authority of an agent has no application when the law declares a waiver by estoppel, because of the acts of the company through its agent. Such estoppels do not rest upon the power or lack of power of an agent to change the conditions of a policy or waive any of its agreements, but arise in law because of the acts of the company through its agents acting within the scope of his apparent power as its representative.” Cooley’s Briefs on Insurance, p. 2508, and authorities cited.

Counsel in their brief say: “The evidence indisputably shows that the secretary and treasurer of the Grand Lodge did not receive the past due April and May assessments.

We submit that there is nothing contained in the agreed statement of facts to justify this statement, because that was one of the questions necessarily involved in the finding of the jury under the instructions of the court. The jury must have found, as a matter of fact that it was the practice and the custom of the local lodge to waive the rule in reference to the time of the payment of the monthly assessments. The court will observe that according to the agreed statement of facts, the appellant admits that that was true, because it did not pretend to introduce any sort of evidence in rebuttal of the facts proven by appellee. *Murphy v. Order of the Sons and Daughters of Jacob of America*, 77 Miss. 830, and *Morgan v. the same defendant*, 90 Miss. 864, are conclusive of the question raised in this record.

Argued orally by *George Butler*, for appellant.

SMITH, J., delivered the opinion of the court.

Appellant is a mutual benefit association, organized with a system of grand and subordinate lodges. In April, 1905, appellant issued to Willis Smith, a member of its local lodge No. 3056, a benefit certificate by which

it agreed to pay at his death to Celia Smith, his wife, a sum of money not to exceed one thousand dollars, provided the certificate was then in force. The failure to pay the regular monthly assessment of one dollar on or before the 15th day of the month in which it became due *ipso facto* worked a forfeiture of the certificate. Willis Smith died on the 20th day of June, 1910, whereupon appellee, his widow and the beneficiary in the certificate, called upon the appellant for the payment of the amount of the policy. This being refused, she instituted this suit in the court below to collect it. To her declaration appellant pleaded the general issue, and set up by way of notice thereunder that Willis Smith failed to pay his assessments for April, May and June, 1910, and that consequently he thereby became suspended and the certificate forfeited. To this notice appellee replied that she would introduce evidence to prove "that it was the practice and custom of the secretary of lodge No. 3056 not to insist upon a literal compliance with the rules of the association in reference to the time of the payment of assessments due by its members, and that it was and is the custom and practice of the said secretary of said lodge to waive the time of payment of assessments by the deceased, Willis Smith, and the other members of said lodge, and accept double payments of assessments for two months after the expiration of one of said months, and that said practice of waiving the rule in reference to the time of the payments of the assessments was practiced and indulged by the secretary of said lodge and by said lodge at the time of the death of the said Willis Smith. The plaintiff will further introduce evidence to prove that the deceased, Willis Smith, on the — day of May, 1910, paid to the local secretary of said lodge his dues for the months of April and May of said year, and the secretary accepted the payment of said dues for said months, and had not re-

turned the same to the said Willis Smith, or his representatives, and that said Willis Smith departed this life on or about the 20th day of June, 1910, and that shortly after his death, and during the month of June of said year, Will Smith tendered to the secretary of said lodge the assessment of said Willis Smith for the said month of June, which tender was by the secretary declined and refused. The plaintiff will insist that the defendant is estopped from setting up a literal compliance with its rules in reference to the payment of assessments by the deceased and its other members as a defense to this action, and here and now tenders the defendant one dollar, the assessment due by Willis Smith for the month of June, 1910, if the defendant will accept the same."

There was evidence introduced by appellee to prove the matters set up in her reply to appellant's notice under the general issue, but there was no evidence introduced by her tending to show that this custom of the local secretary was known to the appellant's general officers, or that the assessments alleged to have been collected by him for the months of April and May were by him remitted to appellant's general secretary. On behalf of appellant there was evidence in denial of all of the matters set up in appellee's counter notice. There was a verdict and judgment in favor of appellee.

Sections 8, 9, 10, and 11 of the constitution and by-laws of appellant's order are as follows:

"8. Assessments.—Every member of the Odd Fellows' Benefit Association shall be required to pay into the office of the secretary and treasurer of the association a regular monthly assessment of one dollar, for each and every month, on the 1st day thereof.

"9. Forfeiture.—Any member of the Odd Fellows' Benefit Association who fails to pay any regular monthly assessment of one dollar as provided for in section 8, or the annual tax as provided for in section 24, on or before

the 15th day of the month in which the same became due and payable, into the office of the secretary and treasurer, thereby and because of such failure *ipso facto* forfeits his membership in the association and becomes suspended from the association, cancels his policy, and at his death no benefit, as provided for in section 7 of the revised constitution and by-laws, can be paid.

“10. Renewals.—When a member shall have become suspended from the Odd Fellows’ Benefit Association as provided for in section 9 hereof, and who is in good health, may renew his membership in the association by making application as a new member, with medical certificate, surrendering his old policy and paying the sum of one dollar. He shall receive a new policy, which shall be valid only after thirty days from the date of its issue.

“11. Reinstatement.—Any member having been suspended from the Odd Fellows’ Benefit Association not exceeding one month for failure to pay one assessment as required by section 8 of the by-laws and constitution, upon application for reinstatement, may be reinstated by the secretary and treasurer, if in good health and vouched for by the officers of the lodge, upon the payment of two dollars.”

We will express no opinion as to the assured’s right growing out of the alleged payment by him to the local secretary of his assessments for April and May; for, since it is admitted that his assessment for the month of June was not paid at all, and was not tendered to appellant until after his death, which occurred after the 15th of the month, his benefit certificate became thereby forfeited, and the peremptory instruction requested by appellant should have been given, unless it is estopped from pleading the assured’s failure to pay this assessment when it became due by reason of the custom of the secretary of its local lodge to accept payment thereof at a later day. There seems to be some conflict in

the decisions of the various courts which have had this matter under consideration; but a correct conclusion is easily reached, if we bear in mind certain elementary rules governing the relation of principal and agent.

These are: First, that the acts of an agent in excess of his real or apparent authority are not binding upon his principal; second, that limitations upon the authority of an agent, known to persons dealing with him, are binding upon such persons, and they can acquire no rights against the principal by dealing with the agent contrary thereto; and, third, in determining whether the limitations placed by the principal on his agent's authority have been waived by reason of a custom of the agent to act in violation thereof, one of the essential facts to be determined is whether or not such custom on the part of the agent was known to and acquiesced in by the principal.

The secretary of appellant's local lodge was its agent for the purpose of collecting the monthly assessments; his authority so to do being derived from, and limited by, appellant's constitution and by-laws with notice of which assured was charged, for the reason that they constituted a part of his contract. Any act of this local agent, therefore, in excess of the limitations upon his authority contained in the constitution and by-laws, is not binding upon appellant, unless it can be held to have waived such limitations by reason of the custom of its agent to act in violation thereof. There is no evidence whatever tending to show that any general officer of appellant had any sort of notice of this custom on the part of its agent, and, consequently, such a custom cannot be held to have been acquiesced in by appellant. There has been, therefore, no waiver by appellant of the provisions of sections 8, 9, 10, and 11 of its constitution and by-laws, and nothing done by it by which it is estopped from setting up assured's failure to

pay in avoidance of his certificate; and, consequently, the peremptory instruction requested by appellant should have been given.

We must not be understood as intimating that, had the custom pursued by the local secretary in collecting the assessments been known to and acquiesced in by appellant's general officers, it would thereby have been estopped from pleading the assured's failure to pay his assessment for the month of June on or before the 15th day thereof in avoidance of his certificate, for this question does not arise on this record, since there was no evidence of any such knowledge and acquiescence on the part of appellant's general officers.

The judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY v.
J. A. AULT.

[58 South. 102.]

1. MASTER AND SERVANT. *Injuries to servant. Instructions. Trial.*

In a suit by the engineer of a passenger train against a railroad for personal injury caused by running into an open switch, negligently left open by a freight train brakeman, an instruction that if the "railroad or its employees" were guilty of negligence was not objectionable in that it did not point out what employees were negligent, where the single act of negligence charged was the leaving of the switch open and the only servant of the defendant who could have been guilty of any negligence at all was either the brakeman or conductor in charge of the freight train.

2. SAME.

Common sense and not hypercriticism should govern the court in passing upon instructions given or refused.

3. INVALID RELEASE. *Tender of money received for release.*

Where a release from damages for personal injury is obtained by fraud, it is void and the plaintiff on bringing suit need not tender the money received thereunder, but the jury on rendering a verdict for plaintiff should give the defendant credit for the money paid for such release and legal interest thereon.

4. CONTRIBUTORY NEGLIGENCE. *Defense to gross negligence.*

Mere contributory negligence on the part of plaintiff is no defense to reckless or wanton negligence by the defendant.

APPEAL from the circuit court of Monroe county.

HON. J. H. MITCHELL, Judge.

Suit by J. H. Ault against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Sykes & Sykes and *J. W. Buckanan*, for appellant, filed an elaborate brief too long for publication covering the points decided by the court and citing the following authorities: *Railway Co. v. Jones*, 73 Miss. 121; *Dowell v. Railway Co.*, 61 Miss. 532; 1 Labatt on Master & Servant, p. 516; *White case*, 72 Miss. 19; 8 Am. & Eng. Anno. Cas., p. 3, *et seq.*, *Railway Co. v. Deweese*, 82 C. C. A. 190, 153 Fed. 56; *Railway Co. v. Bishard*, 78 C. C. A. 62; *Railway Co. v. Block*, 86 Miss. 426; *Railway Co. v. Guess*, 74 Miss. 170; *Railway Co. v. Thomas*, 51 Miss. 637; *Harris v. State*, 50 So. Rep. 626; *Hampton v. State*, 88 Miss. 259; *Sheenan v. Kearney*, 82 Miss. 702; 3 Wigmore on Evidence, sec. 1958, p. 2603; 2 Wigmore on Evidence, sec. 980, *et seq.*, p. 1108; *Railway Co. v. Chiles*, 86 Miss. 366; *Railway Co. v. Lanning*, 83 Miss. 167; *Railway Co. v. Williams*, 87 Miss. 354-5; *Telephone Co. v. Boker*, 85 Miss. 493; *Wagner v. Gibbs*, 80 Miss. 63, sec. 7163; Thompson on Evidence (2 Ed.), p. 246.

Wm. Baldwin and *D. W. Houston*, for appellee, each filed an extended brief covering all the questions de-

cided by the court but too long for publication, citing the following authorities: *Clisby's Railroad*, 78 Miss. 943-944; *Lake Shore & C. R. R. Co. v. Parker*, 131 Ill. 557, 23 N. E. 237, affirming 33 Ill. App. 405; *Bucklew v. Central Iowa R. Co.*, 64 Iowa, 603, 21 N. W. 103; *Somerset, etc., R. Co. v. Galbraith*, 109 Pa. St. 32, 1 Atl. 371; *Mothershed case*, 20 So. 67, 26 So. 10; *Railroad Co. v. Farr*, 94 Miss. 559; *Railroad Co. v. Wallace*, 91 Miss. 492; *Railroad Co. v. Thompson*, 64 Miss. 584; *Railroad Co. v. Scott*, 95 Miss. 43; *Hardy v. Railroad Co.*, 88 Miss. 752; *Railroad Co. v. Brown*, 77 Miss. 342; *Railroad Co. v. Barrymore*, 85 Miss. 454; *Railroad Co. v. Block*, 86 Miss. 434; *Railroad Co. v. Barrymore*, 87 Miss. 273; *Railroad Co. v. Baker-Kansas*, 98 Pac. 804; *Railroad Co. v. Bodemer*, 139 Ill. 596, 29 N. W. 692, 232 Am. St. Rep. 218; *Lacey v. Railroad Co.*, 81 C. C. A. 362, 152 Fed. 134; *Railroad Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807; *Railroad Co. v. Lee*, 92 Ala. 271, 9 So. 234; *Railroad Co. v. Webb*, 12 So. 374; *Railroad Co. v. Lee*, 92 Ala. 262, 9 So. 230; *Pipe Works v. Dickey*, 93 Ala. 420, 9 So. 720; *Railroad Co. v. Chewning*, 93 Ala. 29, 9 So. 458; *Railroad Co. v. Baker-Kansas*, 98 Pac. 804; *Railroad Co. v. Bodemer*, 139 Ill. 596; 3 Rapalje and Macks Digest of Railway Law, 273; *Railroad Co. v. Turnbull*, 71 Miss. 1038; *Jones v. Railroad*, 72 Miss. 24; *Bean v. Railroad*, 107 N. C. 731, 10 Am. & Eng. R. R. Cas., 716, 11 Ib. 128, 26 Ib. 203; *Railroad Co. v. Harris*, 158 U. S. 326; *Jones v. Railroad Co.*, 72 Miss. 31, 109 Ill. 120, 127 Mass. 86, 18 Kan. 58; *Doyle v. Railroad*, 16 Kan. 58; *Peters v. Railroad Co.*, 39 N. W. 486, and cases cited in notes, 5 Ency. of Ev., 623-4-5 and 8, and notes; *Tuner v. City of Newburgh*, 16 N. E. (N. Y.) 346; *Railroad Co. v. Wood*, 14 N. E. (Ind.) 573; *Railroad Co. v. Chiles*, 86 Miss. 365; *Railroad Co. v. Fowler*, 30 Am. & Eng. R. Cases (N. S.) (Ill.), 715; *Railroad Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 596; *Sobueski v. Railroad Co.*, 42 N. W.

(Minn.) 863; *Mullen v. Railroad Co.*, 34 Am. Rep. (Mass.) 349; *Lusted v. Railroad Co.*, 36 N. W. 857, Syllabus; *Ryan et al. v. Gross*, 12 Atl. (Md.) 115; *Welch v. Railroad Co.*, 70 Miss. 20; *Railroad v. Kasiscake*, 19 Am. & Eng. R. R. Cases (New Series), 407; *Shock v. Railroad Co.*, 52 C. C. A. (5 Cir. App. Miss.) 651; 24 Am. & Eng. Ency. Law (2 Ed.) 318; *Railway Co. v. Jones*, 73 Miss. 127; *Jones v. Railway Co.*, 72 Miss. —; *Railroad Co. v. Harris*, 158 U. S. 326, 39 L. Ed. 1003; *Railroad Co. v. Jones*, 73 Miss. 110; *Hilt v. Terry*, 92 Miss. 671; *American Insurance Co. v. Antrum*, 88 Miss. 518; *Railroad Co. v. Williams*, 87 Miss. 344; *Railroad v. Boswell*, 85 Miss. 313; *Lumley v. Railroad Co.*, 6 Am. & Eng. R. R. Cases (N. S.) 82; *Johnson v. Rowe Ry. & L. Co.*, 4 Ga. App. 742, and *Platt v. Sou. Photo Material Co.*, same book, 164; *Dowell v. Railroad Co.*, 61 Miss. 519, 432; *Railroad Co. v. Block*, 86 Miss. 426; *Railroad Co. v. Brown*, 77 Miss. 338, 29 So. 949; *Railroad Co. v. Thomas*, 51 Miss. 637; *Railroad Co. v. Leighty*, 88 Tex. 606, 32 S. W. 515; *Lake Shore v. Parker*, 23 N. E. (Ill.) 237; *Railroad Co. v. Humphreys*, 83 Miss. 734; *Stevens v. Railroad Co.*, 81 Miss. 195; *Bell v. Railroad Co.*, 87 Miss. 234; *Owens v. Railroad Co.*, 94 Miss. 387; *Railroad Co. v. Dewees*, 82 C. C. A. (8th Cir.) 192; *Wood v. State*, 58 Miss. 741; *Railroad Co. v. Wood*, 14 N. E. (Ind.) 573; *Railroad Co. v. A. P. Alsobrook*, —; —; *Wilson v. Railroad Co.*, 63 Miss. 353; *Wagner v. Gibbs*, 80 Miss. 61; *Reed v. Railroad Co.*, 94 Miss. 641; *Railroad Co. v. Lanning*, 83 Miss. 167; *Railroad Co. v. Williams*, 87 Miss. 344; *Bradford v. Taylor*, 85 Miss. 409; *Railroad Co. v. Farr*, 94 Miss. 599; *Railroad Co. v. Wallace*, 91 Miss. 492; *Railroad Co. v. Thompson*, 64 Miss. 584; *Railroad Co. v. Cobb*, 94 Miss. 564; *Railroad Co. v. Scott*, 95 Miss. 43; *Railroad Co. v. Wallace*, 91 Miss. 497.

Argued orally by E. O. Sykes, for appellant.

Argued orally by *D. W. Houston*, for appellee.

McLEAN, J., delivered the opinion of the court.

The plaintiff was in the employ of the appellant. He was the engineer in charge of appellant's train, known as the New York Limited, a fast passenger train, and plaintiff's run was from Memphis, Tennessee, to Amory, Mississippi. On March 6, 1909, appellee was driving this train, and arrived at Holly Springs, on schedule time, 10:37 p. m. East of Holly Springs, and within less than a mile of the Holly Springs depot, was a side or passing track. A short time before the happening of the injury complained of a freight train of the defendant pulled in on this side track for the purpose of permitting this passenger train to pass, and the train stopped so that the caboose of this train stood about seventy-five feet from the switch, and the track on which the freight train stood was on the left-hand side of the main line; the appellee's position on his engine in passing being on the right-hand side of the engine, which put him to the right of the passing track. The evidence discloses that the employees in charge of the freight train knew the schedule time of the passenger train; indeed, they were required to know this time. As the freight train pulled into the side track, the conductor of the freight train, who was standing at the switch, instructed his brakeman to close the switch. The brakeman, instead of closing the switch, and instead of standing at the switch in order to give signals to the passenger train, went into the caboose, and was in the caboose at the time of the injury complained of. There was no light or signal at the switch to indicate that the switch was open. The conductor of the freight train went to the depot at Holly Springs and there conversed with the appellee, but said nothing to him about the freight train being on the passing track. It was necessary, in order for ap-

appellee to take his train out of Holly Springs, to back the train for some considerable distance in order to get upon the main line. After getting upon the main line there was a heavy grade for some distance, over which appellee's train was compelled to go, and in order to make the grade it was necessary to accelerate the speed of the train. After making the grade appellee slowed down his train to about ten or twelve miles an hour, and was at his post of duty keeping a careful lookout, when, a short distance before he reached the switch, he discovered, by the points of the switch, that the switch was open, so as to cause his train to run into the switch track, and at the same time discovering the rear end of the freight train upon this side track. Owing to the curvature of the track, the open switch could not be discovered until the engineer was within a short distance of the switch. Immediately upon making this discovery, the engineer sanded the track, applied his emergency brakes, and did everything possible to stop his train. Having done all that it was possible for him to do in order to protect the passengers, and being unable to avert the impending collision, and realizing that remaining any longer at his post of duty would be unavailing, both the engineer and the fireman leaped from the train. The fireman jumped to the left, and the engineer to the right of the engine. The fireman escaped uninjured. The engineer fell upon his right leg, or buttock, striking the same on or across the iron rail. He was badly bruised, and his whole body shocked and hurt, by the force of the fall. He immediately began to suffer, but continued his run to Amory. Within two or three days thereafter, as a result of the blow, injury, and shock, the whole left side of the appellee became paralyzed. He became a paralytic, the hearing in one ear and sight in one eye practically gone; the evidence showing that he is practically a mental and physical wreck, and that these in-

juries are permanent. Verdict in the court below was rendered by a jury for the plaintiff in the sum of fifteen thousand dollars, less fifty dollars and interest; the same being amount paid by appellant to appellee in consideration of a release executed by appellee for the injuries.

There is but one count in the declaration, and the negligence complained of is the leaving open, by the employees in charge of the freight train, of the switch leading to the passing track, with the knowledge that this fast passenger train was due and about to pass; and the declaration charges willful, wanton, and gross negligence. The defendant pleaded, not only the general issue, but special pleas, wherein were set up the following defenses: First, that plaintiff, at the time of the injury was driving his train at a greater rate of speed than six miles an hour through an incorporated city or town; second, that he ran into the open switch without observing the rules of the railroad company relative to passing switches; third, that before the institution of the suit plaintiff received and accepted the sum of fifty dollars in payment of the injuries sustained. The contentions of appellant forcefully and ably presented, are the refusal of its peremptory instruction; the refusal of its instructions, marked 1, 2, 3, and 4; and the granting of plaintiff's instruction to the effect that "if the defendant railroad or its employees were guilty of gross negligence or reckless omission of duty, or of wanton disregard of the safety of plaintiff, and if it was the proximate cause of said Ault's injury and paralysis," etc.

An all-sufficient answer to each and every proposition argued by appellant relative to the refusal of its peremptory instruction is that each and every one of the questions submitted were controverted questions of fact—questions which the jury alone had the right to pass upon, and which were submitted to the jury under proper

instructions from the court, except as to the violation of the speed statute, which we will notice later on. The instructions obtained by the appellant upon these disputed questions of fact were exceedingly liberal, and really more so than the law justified. Refused instruction No. 2 was properly refused, because it asked the court to charge, as a matter of law, that certain rules, Nos. 27 and 559 in the rule book of the defendant, were in full force and effect at the time plaintiff was injured. That was a question of fact to be left to the jury, under the evidence in the record, and not a question of law. Refused instructions Nos. 1 and 3, which charged the jury relative to the validity of the releases signed by appellee, are subject to the just criticism that they omit entirely the question of imposition, fraud, and undue influence, practiced upon appellee, as well as his mental condition, at the time when he signed the releases. The vice in refused instruction No. 4 is that it is a peremptory charge that the paralysis of the plaintiff was not the direct, proximate result of his injuries. This was a question of fact for the jury. Both the plaintiff and the defendant received instructions upon both of these questions, submitting them to the jury, and these instructions announced correct principles of law applicable to the evidence in the case.

It is urgently insisted that the instruction for plaintiff, to-wit, was erroneous: "The court charges the jury, for the plaintiff, Ault, that if they believe from a preponderance of the evidence in this case that the railroad or its employees were guilty of gross negligence and reckless omission of duty, and a wanton disregard of the safety of plaintiff, which was the cause of said Ault's injury, paralysis," etc. The criticism is that the instruction charges that "the defendant railroad or its employees," thus making the charge too general—that the instruction should have specified what employees,

and in support of the contention refers to *Railroad Company v. Lanning*, 83 Miss. 167, 35 South. 417. In Lanning's case the court says that: "The third instruction for the appellee is too broad in its terms. It states to the jury that, should they believe 'that the acts of defendant's servants were characterized by willfulness or capriciousness,' they might assess punitive damages. The jury by this instruction were given no definite idea as to what 'acts' were referred to, what 'servants' were meant, or to what special matter their attention was intended to be directed." The criticism by the court in Lanning's case is not at all applicable to the instruction in the instant case, for the manifest reason that in the instant case there was only one "act" of the defendant that was complained of; and, second, the only servant of the defendant who could have been guilty of any negligence at all was either the brakeman or conductor in charge of the freight train. It was the duty of the brakeman to close the switch, and the duty of the conductor, present at the time when the freight train passed into the switch, to see that the switch was closed; and it is immaterial whether one or both were guilty, and it must follow that there was no possible chance for the jury to be misled by the instruction given in the instant case. The sole test was, whether the defendant or either of its two servants were guilty of the "act" complained of.

Common sense, and not hypercriticism, should govern the court in passing upon instructions given or refused.

It is strenuously insisted that the plaintiff should not recover in this case, because he failed to return, or offer to return, to the defendant the fifty dollars received by him in liquidation of the injuries received. It is the well-settled rule in this state, as announced in *Jones v. Railroad Co.*, 72 Miss. 22, 16 South. 379, and reaffirmed in several subsequent cases, that: "If the release was

void, no tender was necessary. But all that is necessary is that the jury, in case a verdict should be found for plaintiff, should credit any amount they may find with the money paid plaintiff by defendant and legal interest thereon." This is the well-settled rule in this court, and is in accord with the weight of authorities in other states, and may be stated to be the generally accepted doctrine. The evidence in this case clearly and indisputably shows that the most shameful imposition was practiced upon appellee by the railroad company and its employees, in making the alleged settlement and in procuring Ault to sign the releases. Without entering into a full recital of the facts, it is sufficient to say that at the time Ault signed this release and accepted the pitiful sum of fifty dollars in settlement of the injuries received by him he was in the hospital of the railway company, at St. Louis, hundreds of miles away from his family and friends and advisers, surrounded by the paid employees of the railway company, almost a monomaniac upon the subject of once more obtaining employment with the railway company; and the assurances from the claim agent that the sum accepted and the release signed by him only related to the slight injury received on the leg are enough to demonstrate the imposition and fraud practiced upon this mentally weak and helpless individual. In addition, the claim agent had Ault to write in this release, "I understand this release." This brings forcibly to mind the act of the thief, who, in order to throw off suspicion, hurried down the street, exclaiming, "Stop, thief!"

Among the crowning glories of the common law is the principle that fraud vitiates every contract into which it enters, and that it does not and cannot look with any degree of allowance upon a contract secured through fraud or imposition, and that a contract so procured is of no benefit whatever to the parties securing it. It is,

indeed, strange to us that railroad companies will not heed the warning which has, so often and so repeatedly been attempted to be impressed upon them, by this and other courts, in exacting releases from those whom it injures under such circumstances as is shown by this record, and we again refer to the expressions of this court used by that distinguished jurist, Judge Truly, in *Railroad Company v. Chiles*, 86 Miss. 365, 38 South. 498.

It is not at all necessary for us to decide whether the mere violation by plaintiff of section 4043 of the Code of 1906, which prohibits the railroad company from running its cars through an incorporated city or town at a greater rate of speed than six miles an hour, is a defense to this suit for the following reasons:

First, the plaintiff bottoms his right of recovery upon the ground that the defendant was guilty of reckless, wanton, and willful conduct; and the only instruction given for the plaintiff was that the mere contributory negligence of the plaintiff would not shield the defendant from liability by reason of the negligence of the defendant, where its negligence is marked by gross or willful or reckless misconduct. In *Railroad v. Block*, 86 Miss. 426, 38 South. 372, this court properly held upon a state of facts identical with the facts in this case, that: "Leaving the switch open at the time and under the circumstances shown, with a freight train and engine on the side track and a northbound passenger train nearly due and rapidly approaching, was an act of gross negligence, a reckless omission of duty, a wanton and criminal disregard of the safety, not only of the engineer and the fireman of the approaching train, but also of the passengers as well. In such a case mere contributory negligence on the part of the plaintiff is no defense." The evidence in the instant case unquestionably shows a reckless omission of duty, a wanton and crim-

inal disregard of the safety of the plaintiff; and consequently the mere fact that the plaintiff himself was guilty of simple negligence does not preclude his recovery. The rule is settled by all of the authorities that, where the defendant is guilty of willful, reckless conduct, the plaintiff's negligence is no answer to the suit.

Second, at the instance of the defendant the court, in defendant's first instruction, told the jury that, "if they believe from the testimony that just before discovering the open switch plaintiff was running his engine at a rate of speed of over six miles an hour within the corporate limits of the city of Holly Springs, and was violating the rules of the defendant company in failing to have his train under control, and in failing to stop before entering the switch, then these acts of the plaintiff were the proximate cause of the injury, and the plaintiff could not recover." By the third instruction for the defendant the jury were charged that "if they believe from the testimony that under the rules of the company plaintiff should have had his train under control, and should have stopped it before entering the switch, because there was no light on the switchstand; and if they further believe from the testimony that plaintiff was running the engine at a rate of speed of over six miles an hour within the corporate limits of the city of Holly Springs just before he discovered the open switch, its rate of speed was unlawful; and if the jury believe from the evidence that these acts of the plaintiff, in violation of the rules of the defendant company and in violation of law, constitute gross, willful, or wanton negligence on the part of the plaintiff, and were the proximate cause of the injury, then the jury must return a verdict for the defendant." These instructions were certainly as liberal for the defendant as the law justifies, and as given to the jury under the facts shown in evidence the appellant has no cause of complaint. *Affirmed.*

DR. J. P. CONN AND T. J. COLLINS v. ROSA C. BOUTWELL.

[58 South. 105.]

1. CONVEYANCE TO HUSBAND AND WIFE. Code of 1906, section 2770. Bona fide purchaser. Infants. Ejectment. Equal equities.

Under section 2770, Code of 1906, which has been the law in this state since the adoption of the Code of 1880 and which provides that "all conveyances or demises of land made to two or more persons or to a husband and wife, shall be construed to create estates in common, and not in joint tenancy or entirety, unless it manifestly appears from the tenor of the instrument, that it was intended to create an estate in joint tenancy or entirety with the right of survivorship," a deed to a husband and his wife creates an estate in common and each owns an undivided one-half interest in the land.

2. INFANTS. Conveyances. Avoidance. Bona fide purchaser.

The right of an infant to void his contract is an absolute and paramount right, superior to all equities of other persons and may be exercised against a bona fide purchaser from the infant's grantee.

3. SAME.

When an infant conveys lands the title to which is in him, in the eye of the law there is no conveyance—not void it is true, but voidable; and it is not necessary for the infant to go into chancery to disaffirm his conveyance, but he has the right to bring an action of ejectment for the recovery of the land upon the idea that he never made any legal conveyance of the property.

4. EQUITY MAXIMS. Equal equities. Bona fide purchasers.

Where a defendant acquired the legal estate at the time and as a part of his original purchase, the fact of his purchase having been *bona fide*, for value and without notice, is a perfect defense in equity to any suit brought by the holder of a prior equitable estate, lien, incumbrance or other interest seeking either to establish and enforce his equitable estate, lien or interest, or to obtain any other relief with respect thereto which can be given by a court of equity.

APPEAL from the chancery court of Lawrence county.
HON. R. E. SHEEHY, Chancellor.

Suit by Mrs. Rosa C. Boutwell against J. P. Conn et al.

From a decree for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Jones & Tyler and *G. Wood Magee*, for appellant.

E. L. Dent, Hirsh, Dent and *Landau*, for appellee.

No brief of counsel on either side found in the record.

Argued orally by *P. Z. Jones*, for appellant, and *R. L. Dent*, for appellee.

McLEAN, J., delivered the opinion of the court.

The appellee brought suit in the chancery court against appellants to recover a tract of land, upon the ground that during her infancy the complainant executed a deed of conveyance to Conn, and after having attained majority desired to disaffirm the conveyance. The evidence discloses that the complainant was a minor and a married woman, and that the land conveyed by her to Conn was acquired by her through a series of transactions and embracing an exchange of lands. Sixty-five acres of land, as acquired by complainant, came from her father. The sixty-five acre tract complainant exchanged with her brother-in-law, W. L. Lawrence, for another tract consisting of seventy-seven acres; and her husband agreed to pay, and did pay, as the difference in the value of the two tracts, three hundred dollars to W. L. Lawrence. After this, another exchange of land was made, whereby Mrs. Boutwell and her husband exchanged this seventy-seven acre tract with another one of her brothers-in-law, O. J. Gullege, for one hundred and twenty acres of land. This one hundred and twenty acre tract was valued at one thousand dollars, and the conveyance from O. J.

Gullege for the land in controversy was made to Mrs. Boutwell and to her husband. The conveyance from Gullege and wife to complainant bore date October 1, 1906, and was made to "Pink Boutwell and wife." The deed from complainant and her husband to Conn was executed on the 5th day of December, 1906, and was signed by both W. P. Boutwell and his wife, Mrs. Rosa C. Boutwell. On the 10th day of November, 1908, J. P. Conn, in consideration of the sum of one thousand dollars cash, conveyed to Thomas J. Collins eighty acres of the land which Conn purchased from Boutwell and wife. The several parties, at the date of their respective purchases, took possession of the land, and Conn and Collins have made valuable improvements upon the property. All of these conveyances were properly acknowledged and recorded in the chancery clerk's office of the county in which the lands were situated. The chancellor decreed that the complainant, Mrs. Boutwell, was the legal and equitable owner of the whole one hundred and twenty acre tract, and canceled and set aside the conveyance made by complainant and her husband to Conn, conveying to him this one hundred and twenty acre tract, and also canceled and set aside the deed from Conn to Collins, conveying to him eighty acres of the one hundred and twenty acre tract.

The complainant's contention is that, while the deed from Gullege and wife was made to her and her husband, yet she was the real owner of the property; that her husband had no interest whatever in the property, as the property was acquired by exchanging her seventy-seven acre tract for this one hundred and twenty acre tract. It is contended on the part of the defendants, appellants here, that Mrs. Boutwell, by her conduct and representations, is estopped from setting up her minority. Upon this proposition the case is a very close one, and we do not think it necessary to express an opin-

ion upon the question, except in so far as to say that we do not think the evidence would justify us in setting aside the findings of fact by the chancellor upon this proposition. We emphasize the fact that the complainant did not have the legal title to the whole one hundred and twenty acre tract; but she only acquired the legal title to an undivided one-half interest in this property by reason of the conveyance from Gullege to complainant and her husband. Section 2770 of the Code of 1906, which has been the law in this state since the adoption of the Code of 1880, is as follows: "All conveyances or devises of land made to two or more persons, or to a husband and wife, shall be construed to create estates in common, and not in joint tenancy or entirety, unless it manifestly appears, from the tenor of the instrument that it was intended to create an estate in joint tenancy or entirety with the right of survivorship; but this provision shall not apply to mortgages or devises, or conveyances made in trust." Prior to 1880 the statutory law in force in this state was the same as the above-quoted statute, except there was omitted from the statute the expression "or to a husband and wife;" in other words, prior to 1880 the statute read as follows: "All conveyances or devises of lands made to two or more persons, shall be construed to create estates in common," etc. Rev. Code 1857, ch. 36, art. 18. The question is presented, for the first time in this court, whether under this statute a conveyance to a husband and wife created an estate in common, or in joint tenancy, or in entirety.

In *Hemingway v. Scales*, 42 Miss. 1, 97 Am. Dec. 425, 2 Am. Rep. 586, this court, in construing this statute, says that its evident purpose was to abolish the *jus accrescendi*, the right of survivorship, the distinguishing feature of joint tenancy, so that the estate of a joint tenant, upon his death, might descend to his heirs as

in case of tenancy in common. It merely converted a joint tenancy into tenancy in common. It made no change in the law in regard to the estate of husband and wife, which, as was pointed out, is a very different estate from that of joint tenancy; and consequently the court held that the statute did not apply to conveyances to husband and wife, which in legal construction, by reason of the unity of husband and wife, are not strictly joint tenancies, but conveyances to one person, the court saying that husband and wife are seised of the entirety, and the survivor takes the whole, and during their joint lives neither of them can alien so as to bind the other. This principle was reaffirmed in *McDuff v. Beauchamp*, 50 Miss. 531, wherein it is held that under the statute of 1857 a conveyance to a husband and wife jointly created an estate of entirety. It does not make them joint tenants or tenants in common. Both are seised of the entirety, and have none of the incidents of cotenancy. This decision was rendered in 1874, and when the disabilities of coverture were removed by the legislature in 1880, in order to change the effect of conveyances when made to husband and wife, as announced by this court in the authorities hereinbefore cited, there was inserted in the statute (Rev. Code, 1880, section 1197) for the first time the clause "or to a husband and wife;" the manifest object and purpose of this amendment being to place husband and wife upon the same footing relative to conveyances or devises of lands as other persons.

It therefore follows that the deed by Gullege and wife to Boutwell and his wife created an estate in common. They became tenants in common as to the one hundred and twenty acres of land, each owning an undivided one-half interest therein. The evidence shows that, while Mrs. Boutwell only had the legal title to an undivided one-half interest, yet as a matter of fact she claimed

she was the equitable owner of the remaining interest in the land; and the question therefore arises: What, if any, rights have these defendants? After a protracted examination of this record, we are driven to the conclusion that Conn and Collins are *bona fide* purchasers for value without notice of the rights of Mrs. Boutwell, except that which is shown by the deed records; and we have seen that that right is the legal title to an undivided one-half interest in the whole and an equity in the other remaining one-half interest.

This court, in *Brantley v. Wolf*, 60 Miss. 420, lays down the true rule to be that "the right of an infant to void his contract is an absolute and paramount right, superior to all equities of other persons, and may therefore be exercised against a *bona fide* purchaser from the infant's grantee." This is the undoubted rule, as borne out by all of the authorities, and the principle upon which it is based is that the *bona fides* of the purchaser cannot supply the infant's want of capacity. When an infant conveys lands, the title to which is in him, in the eye of the law there is no conveyance—not void, it is true, but voidable; and consequently it is not at all necessary for the infant to go into the chancery court to disaffirm his conveyance, but he has a right to bring an action of ejectment for the recovery of the land, and he is permitted to recover upon the idea that he never made any legal conveyance of the property. The record here presents a very different question as to the interest in the one hundred and twenty acres of land which was conveyed to the husband and the infant. As we have seen, the husband acquired the legal title to an undivided one-half interest. The purchasers, Conn and Collins, acquired the legal title to this interest, and their equities are equal to the equities of Mrs. Boutwell as to her undivided one-half interest in the property. In *Clark v. Rainey*, 72 Miss. 151, 16 South. 499, the claim

of a *bona fide* purchaser for value prevailed over the undisclosed equity of a minor.

Neither counsel has referred us to any authority exactly in point, but we find no difficulty upon principle in reaching a solution of this question. In Pomeroy's Equity Jurisprudence (3d Ed.), section 767, wherein is discussed the rights of a *bona fide* purchaser, it is said: "In the first place, it is the very central portion of the doctrine, to which all others have been additions, that where the defendant acquired the legal estate at the time and as a part of his original purchase, the fact of his purchase having been *bona fide*, for value, and without notice, is a perfect defense in equity to any suit brought by the holder of a prior equitable estate, lien, incumbrance, or other interest, seeking either to establish and enforce his equitable estate, lien, or interest, or to obtain any other relief with respect thereto which can be given by a court of equity." The authorities cited by this eminent author fully sustain him in this statement of the law. Numerous instances are cited by this author where a *bona fide* purchaser is protected, first, as against a resulting or constructive trust; second, as against prior liens, against an express trust, against community property interest of the wife or her heirs in favor of the purchaser from the husband, in whose name the legal title stood, and numerous other instances. The distinction between the instant case and one where the legal title was in the infant, who conveyed to a *bona fide* purchaser, is clearly drawn in the following authorities: *Hill v. Moore*, 62 Tex. 610; *Edwards v. Brown*, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87; *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909, where the legal title was in the husband; and, *Daniel v. Mason*, 90 Tex. 240, 38 S. W. 161, 59 Am. St. Rep. 815, where the legal title was in the wife, and she conveyed to the *bona fide* purchaser. In the latter case it was held that

the deed was void by reason of the coverture of the wife, and hence the *bona fide* purchaser was not protected; whereas, in the former case, the title being in the husband, and the equities of the purchaser being equal to the equities of the wife, the purchaser acquired a good title.

In *Goodwynne v. Bellerby*, 116 Ga. 901, 43 S. E. 275, the court held that a *bona fide* purchaser for value without notice should prevail over the equity of an infant in lands where the legal title to the land was in the father of the infant. We fail to see any distinction in principle between that case and the instant case. Pomeroy's Equity Jurisprudence, vol. 2, section 739, says that the doctrine of *bona fide* purchase is not a rule of property or of title; but the court of equity wholly ignores the question of validity, declines to examine into the intrinsic merits of the two claims, bases its action upon entirely different considerations, and says as follows: "If a plaintiff, holding some equitable interest of right, sues to enforce it against a defendant who has in good faith obtained the legal estate, the court simply refuses to interfere and do an unconscientious act, by depriving him of the advantage accompanying such an innocent acquisition of the legal title. On the other hand, if the plaintiff is the legal owner, and sues to obtain some equitable relief against a defendant who is the innocent holder of some equitable estate or interest, the court in like manner simply refuses to do an unconscientious act by giving any aid to the plaintiff, but, without at all deciding or even examining the intrinsic merits of their claims, leaves him to whatever rights would be recognized and whatever reliefs granted by a court of law." In *Seldner v. McCreery*, 75 Md. 296, 23 Atl. 641, affirmed in *Economy Savings Bank v. Gordon*, 90 Md. 486, 45 Atl. 176, 48 L. R. A. 67, it is said that "where a title is perfect on its face, and no known

circumstances exist to impeach it or put a purchaser on inquiry, one who buys *bona fide* and for value occupies one of the most highly favored positions in the law." In *Townsend v. Little*, 109 U. S. 504, 3 Sup. Ct. 357, 27 L. Ed. 1012, it is said that "nothing is clearer than that a purchaser for a valuable consideration, without notice of a prior equitable right, obtaining the legal estate at the time of his purchase, is entitled to priority in equity, as well as at law, according to the well-known maxim that when equities are equal the law should prevail," referring to quite a number of authorities.

Indeed, one of the maxims of equity is, "Where there is equal equity, the law must prevail;" and Pomeroy's *Equity Jurisprudence*, section 417, says: "The meaning of the maxim is, if two persons have equal equitable claims upon, or interest in, the same subject-matter, or, in other words, if each is equally entitled to the protection and aid of a court of equity with respect to his equitable interest, and one of them, in addition to his equity, also obtains the legal estate in the subject-matter, then he who thus has the legal estate will prevail. This precedence of the legal estate might be worked out by a court of equity refusing to interfere at all, and thereby leaving the parties to conduct their controversy in a court of law, where, of course, the legal estate alone would be recognized. One of the most frequent and important consequences and applications of this principle is the doctrine that when a purchaser of property for a valuable consideration, and without notice of a prior equitable right to, or interest in, the same subject-matter, obtains the legal estate in addition to his equity claim, he becomes, in general, entitled to a priority both in equity and at law."

If the complainant should institute an action of ejectment for the recovery of this property, she could only recover an undivided one-half interest in the property,

simply because she never at any time had the legal title to the remaining undivided moiety. Our conclusion therefore is that, since Conn and Collins bought this property in good faith for value and without notice of Mrs. Boutwell's equity in the property, she cannot recover except her undivided one-half interest, which was conveyed to her in the deed from Gullege and wife.

In view of the fact that the cause must be reversed, we do not consider it proper to pass upon the question of improvements, as the defendants will doubtless amend their pleadings so as to file a cross-bill, praying that they have a lien upon the land for the value of the improvements. But we express no opinion at all upon the question.

Reversed.

ALBERT RUBE v. STATE.

[58 South. 99.]

TRESPASS. Indictment. Sufficiency. Code of 1906, section 1394.

An indictment for trespass drawn under Code of 1906, section 1394, is fatally defective, which fails to allege, either that defendant went upon the inclosed land of another without his consent, after having been notified by such person or his agent not to do so, or that he remained on such land after a notification by such person or his agent to depart.

APPEAL from the circuit court of Newton county.

HON. C. L. DOBBS, Judge.

Albert Rube was convicted of trespass and appeals.

The indictment preferred against the appellant is as follows: "The grand jurors for the state of Mississippi, elected, impaneled, sworn, and charged in and for Newton county, state aforesaid, in the name and by the au-

thority of the state of Mississippi, upon their oath, present that Albert Rube, on the 1st day of December, 1910, in Newton county aforesaid, with force and arms into a certain yard or parcel of land, or real property, the same being inclosed with a fence and then and there in the possession of J. T. Harvey, unlawfully, willfully, and maliciously did enter and trespass upon the aforementioned parcel of land or real property, by entering onto said land in person and on foot aforesaid, against the peace and dignity of the state of Mississippi.”

To this indictment defendant demurred; grounds of demurrer being as follows: (2) “Because the indictment does not set out in it that fact in the crime of trespassing on property which shows that notice or warning by the party in possession of the property to defendant, which is the essential point in such crime.” (3) “Because the indictment does not show that such entering on the property mentioned was without the consent of the party in possession, to-wit, J. T. Harvey.”

Section 1394 of the Code of 1906 is as follows: “If any person shall go upon the inclosed land of another without his consent, after having been notified by such person or his agent not to do so, either personally or by published or posted notice, or shall remain on such land after a request by such person or his agent to-part, he shall, upon conviction, be fined not more than fifty dollars for such offense. The provisions of this section shall apply to land not inclosed where the stock law is in force.”

A. W. Cooper, for appellant.

We do not believe the indictment charges a crime. It is evidently drawn under section 1394 of the Code of 1906, and to charge a trespass under that section should set out the negatives; for without them in this section no trespass is charged, and certainly no trespass is committed unless proven.

The charging part of the indictment says "trespassed on said land by entering onto said land in person and on foot."

Is it a trespass, or any crime whatever for me to "enter onto a lot or piece of land in person and on foot," unless I do so against the will of having been notified by the owner or person in possession, not to enter?

What is trespass?

The amount of violence used is immaterial, as this will be implied by the law from the circumstances of the case. The mere touching of one's person against his will, the entering upon one's realty without his consent, and these negatives are necessary to the committing of a trespass, certainly should be set out in the indictment. See *State v. Sparrow*, 52 Mo. App. 374, 23 Tex. App. 404, 5 S. W. App. 117.

Ross A. Collins, attorney-general, for appellee.

The indictment in this case, attempting to follow section 1394, Code of 1906, charges that Albert Rube, on the first day of December, 1910, in Newton county, Miss., with force and arms, entered a certain yard or parcel of land, or real property, the same being enclosed with a fence, and then and there, in the possession of J. T. Harvey, unlawfully, willfully and maliciously did enter onto, and trespass upon, the aforesaid mentioned parcel of land, or real property by entering onto said land in person and on foot, as aforesaid, etc.

The sole point in the case raised in the court below by demurrer of the defendant, and raised in this court by assignment of error and brief of appellant, arises out of the facts that the indictment fails to state that Albert Rube trespassed on the enclosed land of J. T. Harvey, without his consent, after having been notified by such person, or his agent, not to do so either personally or by published or posted notice, or shall remain on said land after a request by such person, or his agent, to depart.

Whether or not the words, "unlawfully, willfully and maliciously" cures an otherwise defective indictment, I am not prepared to say. This proposition I respectfully submit to this honorable court.

McLEAN, J., delivered the opinion of the court.

The indictment in this case was drawn under section 1394 of the Code of 1906. It fails wholly to allege that the defendant went upon the inclosed land of another without his consent, after having been notified by such person or his agent not to do so. Neither did the indictment allege that he remained on such land after a notification by such person, or his agent, to depart. In order for the indictment to be good, it must allege one of the two things above named.

The indictment charges no crime and the demurrer should have been sustained. *Reversed.*

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

MARCH TERM, 1912.

BALLARD MCNIECE *v.* STATE.

[58 South. 3.]

PERJURY. *Materiality of testimony.*

The false swearing of a witness in a case, in order to constitute perjury, must refer to a matter material to an issue then being tried.

APPEAL from the circuit court of Lauderdale county.
HON. JNO. L. BUCKLEY, Judge.

Ballard McNiece was convicted of perjury and appeals.

The facts are fully stated in the opinion of the court.

Cochran & McCants, for appellant.

False swearing in order to be perjury in law, must be done with reference to some matter material to the determination of the issue involved. *Jennings v. State* 7 So. 462.

It was incumbent upon the state to prove that perjury was committed with reference to a material fact, but the state offered no proof on that question. On the contrary, the appellant offered to prove by the mayor that the alleged false swearing was wholly immaterial. *Lonnie Sloan v. State*, 71 Miss. 439.

The test as to whether false swearing was a matter material in the inquiry is whether it "tended to forward or retard the issue under investigation." *John White v. State*, 1 S. & M. 156.

The state not only failed to prove that the evidence of appellant before the mayor tended to forward or retard the inquiry as to the question of the guilt or innocence of Nancy Tigue, but the testimony of the mayor which was offered by appellant and excluded by the court was that he did not call appellant as a witness in order to get more light on the question of the guilt or innocence of Nancy Tigue, because he had already found her guilty; that he was advised that appellant would swear that he did not purchase any whiskey from Nancy Tigue, and that he called appellant and swore him solely for the purpose of laying a trap to catch him for perjury, and immediately after he was sworn and examined, he ordered a policeman to take charge of him and lock him up in jail. It is, therefore, manifest that the evidence of appellant before the mayor was wholly immaterial and that he did not commit perjury within the meaning of the law.

In the case of *Beecher v. Anderson*, 8 N. W. 539, the court said:

"Perjury is committed 'when a lawful oath is administered in some judicial proceeding to a person who swears wilfully, absolutely and falsely in a matter material to the issue or point in question.' 3 Just. 164; 4 Bl. Com. 137; *People v. Fox*, 25 Mich. 492. By this is meant that the oath must be material; the facts sworn to may be material and yet the false swearing be no per-

jury unimportant and immaterial. This point is well illustrated in the case of *People v. Fox*, just referred to. Fox was informed against for having made a false affidavit in a suit at law pending in the circuit court for the county of Branch wherein he affirmed that one of the defendants in said suit did not execute the obligation sued upon. The fact sworn to was material, but it did not appear from the information that the affidavit was made to be used in the case, or that it actually was used, or that it performed or was to perform any important office whatever in the case. It did not therefore appear that the oath was of any materiality. *People v. Gaige*, 26 Mich. 30, is, if possible, still more directly in the point. It was averred that the facts sworn to were material, but the information did not show that the bill was one of a material character required by law to be under oath, or that it was sworn to in order to be used as the foundation of any motion or other application to the court. So for as appeared, therefore, the oath was a mere idle ceremony, and its being taken in the case was of no importance. And it was held in that case that the defect in the information could not be supplied by proof showing that the bill was in fact sworn to in order that it might be used as the foundation for a motion for an injunction.”

We say that the testimony of Mayor Parker was competent and that the court erred in excluding it.

W. W. Venable, District Attorney Tenth District, for appellee.

The argument of counsel take this form: Perjury can only be predicated on a wilfully and corruptly false statement about a material matter. That Mayor Parker had already reached a mental conclusion as to the guilt of Nancy Tigue and she had stated that she was guilty, so that anything which McNeise might say could not affect the judgment of the court and hence was immaterial and so, though wilfully and corruptly false, could not furnish a foundation for a prosecution for perjury.

In reply to this contention, we respectfully submit that the test of materiality is not the mental effect which a given testimony might or might not have upon the particular tribunal sitting for the determination of the facts in the case in which the testimony is offered. If this be correct, all that would be necessary in order to escape punishment for wilful and corrupt false swearing in a judicial proceeding, would be for the defendant to prove that his particular false statements had no probative value in the eyes of the trier of the facts. The more patent the falsity of the testimony the less likelihood of guilt, since the jury or court would be less likely to believe it. This, it seems to us, reduces the contention of my learned and able friends, counsel for appellant, to a position which is wholly untenable. If this be the law, as stated by counsel for appellant, then guilt in a perjury case depends upon mere chance of persuasion. Where there was equal moral turpitude, one would be guilty because he happened to persuade and other would be innocent because, though with an equal malevolence of purpose, their testimony was not believed.

It will be noticed that the mayor was satisfied of her guilt but had not formally announced his judgment of conviction. No judgment had been entered or rendered, sentence had not been passed and the cause was still a pending one in course of trial. It is not contended that the mayor did not have the right to call the witnesses in the case and examine them, as a matter of law, but it is contended that even though they were called pursuant to this right resident in the court, still they were at liberty to lie to their heart's content, and could commit perjury for the reason that the court's mind was settled as to the guilt of the defendant on trial and concluded that if the witness, McNeise, came prepared to perjure himself, he would give him an opportunity so to do and also to reap the fruits of his crime.

We submit that the test of "materiality" in the law of perjury is not the secret motives of courts in calling

witnesses, nor the effect that their testimony may have upon the triers of fact.

We respectfully submit that the test of materiality in the matter of giving testimony is whether it is pertinent in proving or disproving the issue in the case being tried or when it has a legitimate tendency to prove or disprove any material fact in the chain of evidence by which the issue is sought to be proven or disproven. *Jennings v. State*, 7 So. 462; *Nelson v. State*, 47 Miss. 621.

We refer the court to the 30 Cyc. 1417 and cases there cited.

SMITH, J., delivered the opinion of the court.

On the trial of one Nancy Tigue in the court of the mayor of the city of Meridian for the unlawful sale of intoxicating liquor, appellant, a witness for the prosecution, testified that he had not purchased any such liquor from Nancy. Afterwards he was indicted for perjury, alleged to have been committed in so testifying.

On the trial there was evidence on the part of the state that appellant had purchased whisky from Nancy, and on the part of appellant there was evidence in denial thereof. Appellant offered to prove by the mayor of Meridian, before whom Nancy Tigue was tried, that after two witnesses had testified that they had seen her sell intoxicating liquor to appellant, she withdrew her plea of not guilty and entered a plea of guilty; that after this plea of guilty had been entered, but before sentence had been pronounced, he (the mayor) had appellant called, sworn, and interrogated as a witness, for the purpose of having him prosecuted for perjury, should he deny purchasing the liquor. This evidence, on objection by the state, was by the court excluded.

In the absence of an issue of fact between the parties to a cause, there is no occasion for the introduction of testimony, and, if introduced, it could in no way affect

the rights of the parties thereto. Consequently, all evidence, in the absence of such an issue, is irrelevant and immaterial. When Nancy Tigue entered her plea of guilty to the crime for which she was then being tried, there was no longer any issue of fact in the cause, and if appellant was not introduced as a witness until this plea had been entered, his testimony was wholly irrelevant and immaterial; and since the false swearing of a witness in a case, in order to constitute perjury, must refer to a matter material to an issue then being tried, the evidence offered by appellant should not have been excluded.

The judgment of the court below is reversed, and the cause remanded. *Reversed and remanded.*

HENRY ISABEL v. STATE.

[58 South. 1.]

1. CRIMINAL LAW. Venue. Proof. Judicial district. Code of 1906, section 1401.

Where there are two judicial districts in a county, on the trial of an offense it must affirmatively appear, not only that the offense was committed, but that it was committed in the judicial district in which the indictment charges it to have been committed or else there is no jurisdiction shown in the court to try the case.

2. SAME.

When the law creates two judicial districts in any county, the effect is the same as to jurisdiction as if there were two counties.

3. SAME.

Code 1906, section 1401 which provides that where the evidence makes it doubtful in which of several counties the offence is committed, such doubt shall not avail to secure the acquittal of defendant, has no application where there is no attempt to prove the place of the offense.

4. **SAME.** If the proof offered placed the commission of the offense so close to both judicial districts as to leave it in doubt as to which it actually occurred in; whether the first or the second district, Code of 1906, section 1401 would apply.

APPEAL from the circuit court of Chickasaw county.

HON. H. K. MAHON, Judge.

Henry Isabel was convicted of felonious assault and he appeals.

The facts are fully stated in the opinion of the court.

Joe H. Ford, for appellant.

The first ground which I desire to argue on this appeal is the failure on the part of the state to prove the venue in this case in the trial of the court below.

It devolves upon the state to prove every material fact necessary to establish the guilt of the defendant beyond every reasonable doubt and to a moral certainty, before conviction can be had. One of the first things every student of the law learns is that the jurisdiction of the court trying a case, and especially a criminal case, must be proven beyond all controversy. The court must have territorial jurisdiction. To put it in legal phrase, the venue must be proven. The jurisdiction of every criminal court is limited to the county in which the crime was committed, by section 26 of Constitution of the state of Mississippi, that section providing, among other things, that, "In all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county, where the offense was committed," must be had.

This court decided in the cases of *Vaughan v. State*, 3 S. & M. 553, 1 Morris State Cases, 245; *Thompson v. State*, 51 Miss. 353, that the venue must be proved as laid in the affidavit or indictment or conviction cannot be sustained. And it further held that where the record fails to show that the offense was committed in the county where alleged in the indictment or affidavit, the judgment of conviction will be reversed.

As above said, this is the constitutional right of the defendant to insist upon the proving of the venue in every criminal case. The case at bar is a felony, and of course such constitutional requirement will never be considered waived by the defendant; as was held in *Thompson v. State, supra*, above, the record must show that the venue was proven, otherwise a conviction cannot stand, even in misdemeanor cases.

This well-recognized rule of law was not controverted in the court below, but it was contended that this material requisite was dispensed with by section 1401, Code of 1906. That section reads as follows:

“1401 (1329). The same: Venue.—The local jurisdiction of all offenses, unless otherwise provided by law shall be in the county where the offense was committed. But, if on a trial the evidence makes it doubtful in which of several counties, including that in which the indictment alleges it, the offense was committed, such doubt shall not avail to procure the acquittal of the defendant.”

I submit to the court that it was never the purpose of the legislature in adopting this section, to dispense with the proof of the venue in felony cases, as was contended for in the circuit court in this cause.

In the case at bar there was no effort whatever to show that the offense was committed in the first district of Chickasaw county; therefore, it could not be said that the evidence leaves it doubtful as to whether the offense was committed in the first district, when there was no proof whatever offered to show that it was in the first district. The proposition is not a doubtful one in the sense referred to in the above section, but it is a case of the absolute failure of the state to prove that it was in the first district, or that the court had territorial jurisdiction of the offense. That section as I understand it, has reference to crimes which are committed so

near the line between two counties or two districts that it is impossible to show clearly as to which county or district the offense really was committed in, part of the proof showing that it was committed in the county or district where it was being tried, and there being evidence tending to show that it happened over the line in some other county or district; in such case it could be said, in the sense of the statute, that the evidence made it "doubtful" in which of the several counties or districts, including that in which the indictment alleges it, the offense was committed.

If it could be said that the proof in the present case leaves it "doubtful" as to which of the several counties or districts, including that in which the indictment alleges it, the offense was committed, then it would be only necessary to prove the venue of any crime that it was done in the state, and within the district of the circuit court.

To illustrate my meaning more clearly, we will take the third circuit court district of Mississippi, as an example:

The acts of the legislature of 1910, p. 83, ch. 105, section 4, constitutes the counties of Tippah, Benton, Union, Marshall, LaFayette, Calhoun, and Chickasaw, the third circuit court district of Mississippi. A man is being tried for assault with intent to kill and murder, a felony. It is proven and shown by the record that the offense was committed in Mississippi, and in the third circuit court district of the state, without any proof whatever, or any effort to prove, that it occurred in Chickasaw county, the indictment alleging that the offense was committed there. The party is convicted, makes a motion for new trial in one ground of which he sets out that the venue was not proven. The court replies:

"The evidence makes it doubtful in which of the several counties of the third district of Mississippi this

offense was committed. Therefore, under section 1401, Code 1906, it was unnecessary to prove specifically that the offense was committed in Chickasaw county," and overrules the motion for a new trial. Could it be said that such conviction could stand for one moment, in the face of the provision of section 26, the Constitution of Mississippi of 1890, which provides that the defendant shall have a "public trial by an impartial jury of the county where the offense was committed?" Certainly to so construe said section of the Code would make it directly conflict with the Constitution of the state, as above shown, and invalid, for that reason, according to all the decisions on that subject. 12 Cyc. 229, and the many authorities cited in note 45 thereto; *State v. Lowe*, 21 W. Va. 783, 45 Am. Rep. 570; *Riley v. James*, 73 Miss. 1; *Ex parte Fritz*, 38 So. 722; *State v. Montgomery et al.*, 115 La. 155, 38 So. 949; *State v. Hatch*, 91 Mo. 568, 4 S. W. 502; *State v. Smiley*, 98 Mo. 605, 12 S. W. 247; *People v. Brock*, 149 Mich. 464, 112 N. W. 1116; 14 Cent. Dig., title "Criminal Law," section 219, p. 838; and many authorities digested and cited therein, supporting the contention here made.

Claude Clayton, assistant attorney-general, for appellee.

In disposing of this case, in my opinion, it is only necessary to pass upon this assignment of error. Was it necessary to a conviction that the alleged crime be committed in the first circuit court district of Chickasaw county; and, second, if so, is this a jurisdictional fact?

In the case of *Spivey v. State*, 58 Miss. 858, it was decided by this court that the circuit court in one district of a county did not have jurisdiction to try cases that happened in another circuit court district of said county. I am of the opinion that the venue should

have been proven as laid in the indictment, towit, in the first circuit court district of Chickasaw county, and that the same is jurisdictional.

It is true that no special objection was made to this failure upon the part of the state, during the trial, and it only appeared for the first time, in the motion for a new trial.

I do not think that it contravenes the provisions of section 4936, of the Code of 1906, or the contemplation of the legislature, in passing this section.

This court, in the recent case of *Rogers v. City of Hattiesburg*, 55 So. 481, decides that jurisdictional questions may be raised for the first time in the Supreme Court.

Therefore, it follows that if I am correct in my contention that the venue of this case was jurisdictional, it could have been raised for the first time in the Supreme Court and as the court had no jurisdiction to sustain the verdict of the jury because of the failure of the state to prove the venue, this would of necessity cause a reversal of the case.

With these observations, I submit the case to the consideration of the court.

MAYES, C. J., delivered the opinion of the court.

The appellant was indicted for a felonious assault upon one Frank Duncan. The indictment charges that the offense was committed in the first judicial district of Chickasaw county, there being two judicial districts in that county. The trial resulted in the conviction of appellant and a two-year sentence in the penitentiary, and from this conviction and sentence an appeal is prosecuted.

The proof in the case fails to show where this offense was committed; that is to say, it merely shows that the offense was committed in Chickasaw county,

but there is no proof as to whether it occurred in the first or second judicial district. This was made a ground of exception in a motion for a new trial, and the court overruled the same. The contention in the case on the part of appellant is that it must affirmatively appear, not only that the offense was committed, but that it was committed in the judicial district in which the indictment charges it to have been committed or else there is no jurisdiction shown in the court to try the case. When the laws create two judicial districts in any county, the effect is the same, as to jurisdiction, as if there were two counties. An offense committed in one judicial district must be tried in the district in which the offense was committed, and cannot be tried in the other. This was expressly held in the case of *Spivey v. State*, 58 Miss. 858.

But it is claimed that section 1401 of the Code cures the failure to prove the district in which the offense is charged, and the failure to make the proof should not cause a reversal. Section 1401 of the Code of 1906 is as follows: "The local jurisdiction of all offenses, unless otherwise provided by law, shall be in the county in which the offense was committed. But, if on the trial the evidence make it doubtful in which of several counties, including that in which the indictment alleges it, the offense was committed, such doubt shall not avail to secure the acquittal of defendant." This section has no application to this case. The evidence does not leave it doubtful as to where the offense was committed in the sense of the statute, but the evidence utterly fails to prove or attempt to prove where the offense was committed; that is to say, whether in the first or second judicial district. The state did not attempt to prove anything about where the offense occurred, further than to show that it occurred in Chickasaw county. If the proof offered placed the commission of the crime so

close to both judicial districts as to leave it in doubt as to which it actually occurred in, whether the first or second district, the statute would apply. The jurisdiction of the court to try this case depended upon its being committed in the first judicial district of Chickasaw county.

For the above reason, the case must be reversed and remanded. *Reversed and remanded.*

GEORGE FANNIE v. STATE.

[58 South. 2.]

1. HOMICIDE. *Evidence. Dying declaration. Trial. Argument of counsel.*

In order that a dying declaration may be admissible in evidence, it must appear beyond a reasonable doubt, to have been made under the realization and solemn sense of impending death. The deceased at the time of making the declaration, must have had no hope, however slight, of recovery.

2. CRIMINAL LAW. *Improper argument of counsel.*

It is reversible error for the prosecuting attorney in the argument of a criminal case to call the attention of the jury to the fact that the wife of defendant had not testified and that the state could not introduce her as a witness.

APPEAL from the circuit court of Hinds county.

HON. W. A. HENRY, Judge.

Geo. Fannie was convicted of murder and appeals.

The facts are fully stated in the opinion of the court.

Howie & Howie, for appellant, filed an extended brief too long for publication in full contending.

First. That the dying declaration admitted in evidence was not made under a sense of impending death, citing: Underhill on Criminal Evidence, p. 191; 2 Wig-

more on Evidence, p. 1805; *Bell v. State*, 17 So. 232; *Askley v. State*, 37 So. 960; *Slarks v. State*, 6 So. 843; *Matteley v. Commonwealth*, 19 S. W. 977.

Second. That it was error for the court to allow the district attorney to comment on the fact that the accused did not put his wife on the witness stand and overruled the objection of defendant to said comment, citing; 6 Ency. Evidence, p. 895; *Knowles v. People*, 15 Mich. 413; *State v. Watcher*, 29 Ore. 309; *Greaves v. United States*, 150 U. S. 118; *Byrd v. State*, 57 Miss. 243; Greenleaf on Evidence, par. 334; 4 Wigmore on Evidence, p. 3065; *Johnson v. State*, 63 Miss. 313.

Frank Johnson, assistant attorney-general, for appellee, filed an elaborate brief too long for publication and citing the following authorities: *Lester v. State*, 20 So. 232; *Brown's case*, 32 Miss. 433; *McDaniel's case*, 8 S. & M., 401; *McQueen v. State*, 103 Ala. 12; *Regina v. Howell*, 15 Dennison (Crown Cases), p. 1; *State v. Tillman*, 11 Iredel, 513; *State v. Evans*, 124 Mo. 397; *Lambeth's case*, 13 Smedes & Marshall, 322. *Johnson v. State*, 63 Miss. 313; 6 Ency. Evidence, p. 893; *Cole case*, 21 So. 706; *People v. McWhorter*, 4 N. Y. 438; *Gavini v. Scott*, 51 Mich. 373; *Commonwealth v. Webster*, 5 Cush. (Mass.) 295; *McDonough v. Neal*, 113 Mass. 91; *Robertson v. State*, 44 Tex. Cr. App. 211; *Mercer v. State*, 17 Tex. App. 452; *People v. Hovey*, 92 N. Y. 555; *Harris v. State*, 47 So. 643; *Hall v. State*, 22 So. 141; *Blatch v. Archer*, Cowpens Reporter, 63.

Argued orally by *Virgil R. Howie*, for appellant.

Argued orally by *Frank Johnston*, assistant attorney-general, for appellee.

SMITH, J., delivered the opinion of the court.

Appellant seems to have been practically separated from his wife, who was living temporarily with her

aunt. On the night that he killed the deceased, he went to this aunt's house, and, not finding his wife there, went in search of her, and found her in a buggy with deceased returning from church to her aunt's. A difficulty then ensued between appellant and deceased; several shots being fired by each. The only eyewitnesses were appellant, his wife, and deceased. The wife did not testify. Deceased was shot in the neck, from which he bled to death in about an hour and a half or two hours thereafter.

A few minutes after he was shot a man met him "driving along," and, at his request, went with him in his buggy in search of a doctor. Before finding a doctor they met deceased's mother, who then went with them in their search for a doctor. When his mother asked him "how he let that nigger shoot him," he answered: "I could not help myself. He just run up and hailed me, and I turned around, and he shot me the first fire right through." This statement was introduced, over appellant's objection, as a dying declaration, to show that appellant was the aggressor in the difficulty. Appellant admitted the killing, but claimed to have acted in self-defense. The evidence introduced by the state, in order to qualify this statement as a dying declaration, was that deceased, when he first met the man who went with him in search of a doctor, said to him: "Come carry me back to the doctor, I am shot to death." And, while they were looking for the doctor, said: "I am going to die. Make haste and get the doctor. I am bleeding to death. I am going to die. Don't bother me and get the doctor." And again: "Make haste, mamma, and get the doctor, I am going to die." A doctor was finally found, but he did not succeed in stopping the flow of blood. In order that a dying declaration may be admissible as evidence, it must appear, beyond a reasonable doubt, to have been made under the realization and solemn sense of impending death. The de-

ceased, at the time of making the declaration, must have had no hope, however slight, of recovery. *Bell v. State*, 72 Miss. 507, 17 So. 232. Such does not appear to have been the situation of deceased here, when this declaration was made. All that this evidence can be said to prove is that deceased realized that he was bleeding to such an extent that he would die if the flow of blood was not quickly stopped. If this could have been done, he probably would have recovered. It was for this purpose that he was urging his mother and friend to make haste and find a doctor, and there is nothing in this evidence from which it can be said that he did not think that a doctor would be found in time to stop, and who, when found, would in fact succeed in stopping the flow of blood. It cannot be said, therefore, that he had abandoned all hope of recovery. The declaration, therefore, ought not to have been admitted in evidence.

In his closing argument the district attorney, over the objection of defendant, called the attention of the jury to the fact that appellant's wife had not testified reminded them of the fact that the state could not introduce her as a witness, but that appellant could, and suggested to them, that his failure to do so could be accounted for only on the ground that her evidence would show that he was guilty of murder. This argument was highly improper, was prejudicial to appellant, and should not have been made. *Johnson v. State*, 63 Miss. 313; *Cole v. State*, 75 Miss. 142, 21 South. 706; *Johnson v. State*, 94 Miss. 91, 47 South. 897. The reason why argument of this character is improper is fully set forth in *Johnson v. State*, 63 Miss., at page 316.

For the reason that the court erred in admitting in evidence the alleged dying declaration, and because of the improper argument of the district attorney, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

WILL OLIVER v. STATE.

[58 South. 6.]

1. INTOXICATING LIQUORS. *Sale. Variance. Time. Code of 1906, Sections 1428-1762.*

Under the Code of 1906, section 1428, so providing, the day on which an offense is charged in an indictment to have been committed is immaterial, except in those cases where time is of the essence of the offense or a necessary ingredient of its description, and hence, in a case not within this exception, proof that the offense was committed either before or after the day laid in the indictment, but before the indictment was found and within the period prescribed by the statute of limitations, is sufficient.

2. SAME.

Where the state on a trial under an indictment for the unlawful sale of intoxicating liquors, proceeding under Code of 1906, section 1762, introduces evidence of more than one sale, evidence should be given only of sales made "anterior to the day laid in the indictment" for the reason that it is expressly so provided in this section, which alone authorizes the introduction of evidence of more than one sale.

APPEAL from the circuit court of Lafayette county.
HON. H. K. MAHON, Judge.

Will Oliver was convicted of the unlawful sale of intoxicating liquor, and appeals.

The facts are fully stated in the opinion of the court.

Falkner, Russell & Falkner, for appellant.

Section 1762 of the Code of 1906 is very broad in its scope; it allows ever so many sales to be given in evidence but it does say that the state is confined to sales made "anterior to the date laid in the indictment"—not the day of "filing" of the indictment, where the date is laid. *Moses v. State*, 56 So. 457, covers this case in full.

The date in this case is immaterial—it is of the essence of the offense; every right of the defendant is strained to the utmost under section 1762—even allowing the state to go back from “the date laid in the indictment” for two years from such date.

We hold that section 1762, *supra*, is unconstitutional—it violates section 26 of the Constitution; it deprives a defendant of being informed of “the nature and cause of the accusation” against him. Any valid defense, as an alibi, or other defense cannot be interposed by any such proceedings as countenanced by section 1762.

Code 1906, section 1762, is amendatory of section 1596, Code of 1892. That section (1596) was harsh enough; it allowed any number of counts to be placed in one indictment—a drag net in itself; but section 1762 sweeps away every vestige of the right to know about one charge; it attempts to charge at one full sweep every crime of this sort back for two years and that in view of the constitutional right to be apprised of the “nature and cause” of each one of them—the state demands the right to convict upon any one sale yet is allowed to select as many others as may be necessary to make out against defendant such an overwhelming chain of circumstances, or cases, if they can establish them, and use these “circumstances” or cases, toward the conviction in one.

The latter part of section 1762 in no way aids defendant in giving him information of the crime of which he is charged, so that he may defend himself properly and when a trial is had that he may plead former conviction or acquittal. This last part simply forbids the state from pursuing him further, but, we say, this in no wise aids him in his rights under the constitution—what does it avail the defendant who is entitled to a fair and impartial trial upon a single charge, and each and every charge, to be given any such consideration

after the all important question—his guilt or innocence has been put in jeopardy on the trial?

If the constitution and laws of the land can impose a penalty for one charge, and it can, then why not, in justice, allow the defendant to be advised of the nature of that one charge—if it must be tried for several at once, why not inform him of each? A great concession indeed on the part of the state that after humiliating the defendant with a trial whether guilty or innocent, to then say that the defendant shall not be prosecuted further! Great excuse and justification this!

The motion asking to exclude the testimony of the witnesses, Loomer and Douglas, should have been granted. This testimony was gravely prejudicial in this sort of case—the ordinary juror would inevitably surmise, conjecture and become very suspicious of this sort of testimony to defendant's hurt.

Claude Clayton, assistant attorney-general, for appellee.

Appellant was indicted by the grand jury of Lafayette county, for the unlawful sale of intoxicating liquor. The indictment alleges that the defendant did unlawfully sell the intoxicating liquor in question on the 15th day of February, 1911.

On the trial of the case, the state introduced the express agent at Oxford, and the billing clerk who attempted to identify a certain package delivered the defendant. These witnesses do not remotely attempt to say what the package contained and admitting that their testimony was properly submitted to the jury, yet it does not tend to prove the guilt of the defendant.

Two other witnesses were introduced by the state who testified that they bought intoxicating liquor, to-wit, alcohol, from the appellant sometime during the month of February, 1911. They do not show whether

their purchase was before or after February 15th, the date laid in the indictment.

Under that statement of facts, I am of the opinion that the case at bar is identical with certain parts of the case of *Moses v. State*, 56 So. 457. The part of the case at bar that was similar to the *Moses case, supra*, is the testimony of Felix Coleman and Bill Smith, two of the witnesses for the state in the *Moses case*.

Had the indictment been amended in the case at bar, I think a conviction would have been warranted. Every thing was done by counsel for appellant recognized by the law predicated upon the failure of the state to prove the alleged sale of liquor. So, with these observations, I submit the case to the consideration of the court.

Argued orally by *Lee M. Russell*, for appellant.

SMITH, J., delivered the opinion of the court.

This appeal is from a conviction for the unlawful sale of intoxicating liquor. The indictment was turned into court by the grand jury on the 15th day of March, 1911, and charged that the defendant, on the 15th day of February, 1911, in said county, did unlawfully sell vinous, spirituous, malt, alcoholic, and intoxicating liquors, etc. The day on which the sale was actually made was not shown by the evidence; the witnesses simply stating that it occurred some time in February, 1911.

Appellant claims that he was entitled to a peremptory instruction, for the reason that it was not shown that the sale occurred prior to the 15th day of February 1911, the day laid in the indictment. "The day on which the offense is charged to have been committed is immaterial, except in those cases where time is of the essence of the offense, or a necessary ingredient of its description; and hence, in a case not within the above exception, proof that the offense was committed either before or after the day laid in the indictment,

but before the indictment was found and within the period prescribed by the statute of limitations, is sufficient." *McCarty v. State*, 37 Miss. 411; *Miazza v. State*, 36 Miss. 613; Code 1906, section 1428.

Appellant has cited in support of his contention the case of *Moses v. State*, 56 So. 457. . In that case the state, proceeding under section 1762 of the Code, introduced evidence of more than one sale, and this court held that, when that section of the Code was invoked, evidence could be given only of sales made "anterior to the day laid in the indictment," for the reason that it was expressly so provided in this section, which alone authorized the introduction of evidence of more than one sale. In the case at bar this section was not invoked; evidence of one sale only being introduced. Since evidence of one sale only was introduced in the court below, section 1762 of the Code is not brought into review by this case; consequently it is unnecessary for us to respond to appellant's suggestion that this section is unconstitutional.

We find no reversible error in the record, and the judgment of the court below is affirmed.

Affirmed.

HENRY LEE v. STATE.

[58 South. 7.]

CRIMINAL LAW. Capital felony. Trial. Presence of defendant.

It is fatal error in a murder trial to examine a witness in the absence of the defendant.

APPEAL from the circuit court of Quitman county.

HON. SAM C. COOK, Judge.

Henry Lee was convicted of murder and appeals.

The facts are fully stated in the opinion of the court.

P. H. Lowery, for appellant.

In this case, even if there had been no error in the admission or exclusion of evidence, and if the testimony had been overwhelming as to the defendant's guilt, and if the correct result had evidently been reached, the appellant would be entitled to a reversal of this case and a new trial because of the matters shown by the evidence on the motion for a new trial, appearing on pages 91 to 109 of the record. From this testimony it clearly appears that the defendant, during the trial was absent from the court room during the taking of testimony.

I call the court's attention especially to the testimony of Mr. W. M. Donaldson, beginning on page 96 of the record. Just how much testimony was taken in his absence and what it does, does not very clearly appear, but there can be no possible doubt that a witness was introduced and questions asked and answered in his absence, and that he was entirely out of hearing and view of the court when this was being done.

The rule seems to be so well established in this state that it is not necessary to go outside of our own deci-

sion for authorities. *Booker v. State*, 81 Miss. 391; *Sherrod v. State*, 93 Miss. 774; *McLendon v. State*, 96 Miss. 250; *Warfield v. State*, 96 Miss. 170; *Saddler v. State*, 53 So. 783; *Stanley v. State*, 53 So. 497. While in some of these cases, notably *Booker's case*—it was a state's witness which was being examined and the defendant was in jail, this does not seem to make any difference in principle. The rule is the same where it is the defendant's witness and the defendant is under bond. In that case the court quotes approvingly from *State v. Greer*, 22 W. Va. 801, as follows:

“We will not inquire whether the prisoner was unfavorably or otherwise affected by the cross-examination of the witness in his absence. He had a right to be present which he did not and could not waive and had the right to observe every look, gesture and movement of the witness while testifying, etc.”

In the later case of *Sherrod*, the court reviews the whole subject citing much authority, and on page 781, quotes approvingly from *State v. Jenkins*, 84 N. C. 814 as follows: “In every criminal prosecution it is the right of the accused to be informed of the accusation against him and to confront with his witnesses. In capital trials this right cannot be waived by the prisoner, but it is the duty of the court to see that he is actually present at each and every step taken in the progress of the trial.”

This was a case where the defendant was under bond and where his absence was voluntary at the time the verdict was returned.

The court holds in its second conclusion, page 778, that the defendant cannot waive his right to be present whether he be in jail, or under bond when the verdict is returned. In the present case he was actually absent while the testimony was being taken, by far the most important thing in the trial. I especially invite

the court's attention to this case which gives an exhaustive review of the authorities and reaches the inevitable conclusion that under our system of jurisprudence the defendant must be actually present at every step in the trial of a capital case.

McLendon's case, 96 Miss. 250, is a case where the defendant was in custody and where a state's witness was being examined. This is an extreme case but it conforms to the principles none the less.

Warfield's case, 96 Miss. 170, seems to me to place the right of the accused in a capital case to be present at every step of the trial beyond peradventure and to establish beyond controversy the right of the appellant here to a reversal and a new trial. There the absence was voluntary, the defendant being under bond, and the only thing occurring in his absence, so far as the record shows, was the asking of some of the jury whether or not they had been members of the grand jury which found the indictment.

If anything further is needed along this line it is found in the *Stanley case*, 53 So. 497, where almost the identical question here involved is decided. There it was the defendant's witness being examined, and the court, after the defendant was brought into the courtroom, offered to withdraw the case from the jury and also instructed the jury to disregard the evidence which had been heard in the defendant's absence. It is true that in that case the defendant was in custody and his absence was not voluntary but that makes no difference in capital cases, as is firmly established by the authorities heretofore cited.

Frank Johnston, assistant attorney-general, for appellee.

I recognize fully the rule announced by this as well as other distinguished courts, that the defendant, in

a capital felony, must be present during the progress of his trial, a rule based upon the principle that the law and the courts are favorable to the rights of a defendant placed upon trial on a charge of a capital felony. It is not my purpose to controvert, in any manner, the soundness or correctness of this as an abstract rule or doctrine of the law. Its underlying reason and principle is, that the defendant may have, throughout his trial, most ample opportunity to witness the proceedings for the protection of his interests.

In this case it is clear from the special bill of exceptions, taken by the learned counsel for the appellant which shows the testimony in regard to the absence of the defendant from the court room, that no possible prejudice, or injury, could have resulted to him from his temporary absence from the court room, which was only for a brief period of time, and at the moment when Ross, one of his witnesses, was placed on the stand.

It appears clearly from the evidence contained in the special bill of exceptions, that the defendant's absence from the court room was for a brief period, during the time while the testimony of Ross was being taken. No more than two questions had been propounded to this witness before the defendant's absence from the court room was discovered, and the proceedings stopped until he could return to the court room. I am quite sure, from the testimony on this point, that not as many as three questions had been asked of the witness Ross. One of the witnesses said that one question had been asked the witness, another stated that two questions had been asked the witness, but I do not think it was shown that any more than two had been propounded to Ross before the proceedings were stopped and the defendant returned to the court room.

The two questions propounded to Ross, with their answers are as follows:

Q. You know this defendant here, Henry Lee?

A. Yes, sir.

Q. Did you know Wade Robertson?

A. Yes, sir.

This is all. The court is not left to conjecture as to whether or not any possible prejudice could have arisen against the defendant's interests on this state of facts. On the contrary, it clearly and abundantly appears that the two questions asked and answered were innocuous and harmless, and could not have prejudiced the defendant's rights on his trial.

Nothing, therefore, is left to conjecture or speculation. It cannot be argued that prejudice might have arisen for the simple reason that the facts, clearly proven and undisputed, show that these questions and answers were not only harmless, but wholly immaterial as far as the merits of the case is concerned.

I respectfully submit, therefore, that the only question for the court is the application of the abstract rule, or doctrine of the law to the specific facts of this particular case.

WHITFIELD, C., delivered the opinion of the court.

The appellant was indicted for a capital offense, murder, convicted, and sentenced to the penitentiary for life.

During the progress of the trial, through the gross carelessness of the officers, the defendant left the court room, walked down the stairs to the first floor of the court house to get some water, and then returned. During this time the examination of a witness was in progress. This was fatal error, as repeatedly held in this state. *Booker v. State*, 81 Miss. 391, 33 South. 221; 95 Am. St. Rep. 474; *Sherrod v. State*, 93 Miss. 774, 47 So. 554, 20 L. R. A. (N. S.) 509; *Warfield v. State*, 96 Miss. 170, 50 South. 561; *Stanley's case*, 97 Miss. 860, 53 So.

497. And see, also, *Sadler v. State*, 98 Miss. 401, 53 So. 783, and *McLendon v. State*, 96 Miss. 250, 50 So. 864.

PER CURIAM. The above opinion is adopted as the opinion of the court; and for the reasons therein indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

NOAH WILBURN v. STATE.

[58 South. 7.]

1. CRIMINAL LAW. *Indictment for selling liquors. Code 1906, section 1763-5032. Laws of 1908, chapters 113-114-115.*

Where a party was indicted under Code of 1906, section 5032, for the sale of vinous, alcoholic and intoxicating liquors, in less quantities than one gallon, within five miles of the University of Mississippi, such indictment was a nullity as this section of the Code was repealed by chapters 113-114-115 of the Laws of 1908.

2. SAME.

Where an indictment is void, charging no offense at all, the court is without power to permit an amendment thereof.

APPEAL from the circuit court of Lafayette county.
HON. C. L. CRUM, Special Judge.

Noah Wilburn was convicted of the unlawful sale of intoxicating liquors and appeals.

The facts are fully stated in the opinion of the court.

Falkner, Russell & Falkner, for appellant.

The indictment was bottomed upon section 5032, Code 1906; omitting the formal parts it reads as follows: "Noah Wilburn late of the county aforesaid, on the — day of — 1909, in said county, unlawfully did sell vinous, spirituous, alcoholic and intoxicating liquors in

less quantities than one gallon, within five miles of the University of Mississippi.”

A demurrer was filed to the indictment setting up the fact that section 5032 had been repealed by Laws of 1908, chapter 115.

The demurrer was overruled. A motion was then made to set aside the judgment which overruled the demurrer; the court overruled this motion.

The demurrer should have been sustained. *Hughes v. State*, 97 Miss. 528, 52 So. 631.

The amendment allowed a wholly different case to be presented—different in punishment; differently provided for in the statutes, and was allowed to be sustained by proof already barred.

The amended indictment did not specify any date; this was left open even after demurrer was interposed as to this feature.

Frank Johnston, assistant attorney-general, for appellee.

The second, third, fourth, fifth, sixth and seventh assignments of error may be considered together as presenting the general question as to the sufficiency and the amendment of the indictment. (1) It was objected that the demurrer to the indictment should have been sustained. The demurrer was overruled by the trial judge. The indictment in this case was properly held to be good on the demurrer to the same.

The indictment charges the appellant with having unlawfully sold, vinous, spirituous, alcoholic and intoxicating liquors in the county of Lafayette and in the state of Mississippi in the year 1909. The following words in the indictment, viz., “in less quantity than one gallon within five miles of the University of Mississippi,” are purely surplusage. Without those words in the indictment, the offense is clearly and sufficiently

charged and stands as an offense under section 1746, of the Code, as amended by the acts of 1908, (acts of 1908, page 116). It is wholly immaterial, under the general law that I have cited, whether it was sold within five miles of the University of Mississippi, or within five miles of any other point in the county. The offense is sufficiently charged as an unlawful sale of intoxicating liquors within the county.

Conceding that section 5032 defines an offense of unlawful retailing within five miles of the University of Mississippi as a distinct offense and punishable in a particular way, it is equally true that section 1746, of the Code, re-enacted by the legislature in 1908, (acts of 1908, page 116), defines the offense which is charged in the indictment. The repeal of section 5032 therefore, could not effect in any manner, the said act of 1908 which is a re-enactment substantially of section 1746, of the Code. In section 5032, the sale must have been made within five miles of the University with special penalty, while in section 1746, amended by the acts of 1908, a sale of liquor anywhere in the county was a violation of the law, and punishable as such, and this without reference to the specific locality in the county in which the sale was made.

The indictment, therefore, was good under the act of 1908, and the words, "within five miles of the University of Mississippi," was simply surplusage for the simple reason that it was absolutely immaterial at what place in the county the sale was made and whether made within five miles of the University or not, it was an offense under the acts of 1908, amendatory of section 1746, of the Code.

I respectfully submit, therefore, that with the words defining the locality of the offense within five miles of the University of Mississippi in the indictment, still the indictment is good as the words were merely sur-

plusage and constituted no part of the statutory definition of the offense. However, this may be on the demurrer to the indictment most unquestionably the indictment was made good by the amendment ordered by the court which struck out the words, "less than one gallon within five miles of the University of Mississippi."

(2) This brings up the question of the amendment to the indictment. Under the provisions of section 1508 of the Code, the indictment was amendable in this particular. The statute expressly provides that amendments of this class, enumerating them, may be made by the court. This court precisely held in *Rocco v. State*, 37 Miss. 357, in an amendment for retailing, where the name of the person, to whom the sale was made, was stated and "for divers other persons," that it was perfectly competent for the court to strike out the words, "for divers other persons."

In the case of *Haywood v. State*, 47 Miss. 1, the name of the owner of the property stolen was amended, and on the same point is the case of *Robert Garvin v. State*, 52 Miss. 207. An amendment in regard to ordering marks on an amendment in a larceny case was sustained by the court in the case of *Murrer v. State*, 51 Miss. 675.

An amendment to an indictment for trespass to lands was granted by the court in *Knight v. State*, 64 Miss. 802.

In *Miller v. State*, 53 Miss. 403, the name of the injured party in an indictment for assault with intent to kill was changed by an amendment, and this is held to be competent. The same rule was announced in *Wood v. State*, 64 Miss. 761; and the same rule was applied in a murder case, *Miller v. State*, 68 Miss. 221.

The constitutionality of this statute was expressly sustained by the court in the case of *Miller v. State*, 53 Miss. 403, and the later case of *Peoples v. State*, 52 Miss. 434.

In the absence of the statute, and under the common law rule of criminal procedure, in reference to amendments to indictments, especially in cases less than felony, such an amendment was clearly permissible. The statute as to amendments, therefore, only gives force and particularity to the common law rule.

Upon these considerations, I submit therefore that if the amendment was good, that the indictment was good on demurrer, treating the words, "within five miles of the University of Mississippi" as surplusage. Any sentence of the court in the case would be governed by the general law in force and not by the special statute, section 5032, which has been repealed.

(3) That, in any view, the amendment was correct, and cured the indictment in respect to this immaterial or nonessential matter.

Argued orally by *Lee M. Russell*, for appellant.

Argued orally by *Frank Johnston*, assistant attorney-general, for appellee.

SMITH, J., delivered the opinion of the court.

The indictment upon which appellant was tried was drawn under section 5032 of the Code of 1906, and charged him with the sale of vinous, spirituous, alcoholic and intoxicating liquors, in less quantities than one gallon, within five miles of the University of Mississippi. This section of the Code was repealed by chapters 113, 114 and 115 of the Laws of 1908, and consequently the indictment failed to charge appellant with any offense, and was therefore a nullity. *Hughes v. State*, 97 Miss. 528, 52 So. 631.

Over the objection of appellant, this indictment was amended by the striking out of the words "in less quantities than one gallon, within five miles of the University of Mississippi." The indictment being wholly

void, and charging no offense at all, the court was without power to permit an amendment thereof. The offense charged by the amended indictment was different from, and followed by a greater punishment than the one for which appellant was originally indicted.

The judgment of the court below is reversed, the indictment quashed, and appellant discharged.

Reversed.

FRANK R. JOHNSTON v. STATE.

[58 South. 97.]

1. CRIMINAL LAW. *Evidence. Self-serving declaration. Examination of witnesses.*

Where a defendant on trial for the larceny of a steer claimed that he was employed by his brother to drive two steers to market and that he knew nothing about their ownership, except what his brother told him, and that he did not make the sale nor share in the proceeds, but was only paid for driving the cattle, it was reversible error for the court to exclude the testimony of witnesses that accused had stated this to them while driving the cattle to market and such declarations were not self-serving, but explanatory of defendant's possession.

2. CROSS EXAMINATION OF WITNESSES. *Improper questions.*

It was improper for the district attorney to ask a party charged with crime, if he was not known as "Hangman Johnston" and if he had not hanged forty-three men.

APPEAL from the circuit court of Harrison county.

HON. GEORGE S. DODDS, Special Judge.

Frank R. Johnston was convicted of grand larceny, and appeals.

Appellant was convicted of grand larceny, being charged with stealing a steer valued at thirty-five dol-

lars. According to his testimony, his brother, Arthur Johnston, was the owner of certain cattle, which were out on the open pasture, and said Arthur Johnston took appellant with him and pointed out two steers, and employed appellant to drive them to town to a butcher. A few days later appellant went out and drove the two steers, pointed out to him by his brother Arthur, to the city of Bay St. Louis, to a butcher. He contends that he never claimed the cattle, knew nothing about the ownership, except what his brother told him, that he did not make the sale, and had no interest in it, except that his brother paid him for driving them up. It seems that one of the steers belonged to a man named McQueen, and appellant and his brother were afterwards indicted for grand larceny. They obtained a severance and were tried separately by the circuit court of Harrison county on change of venue. Appellant was convicted, and, on appeal, assigns among other errors, the action of the court in excluding a conversation had between himself and witness Quintini, with reference to the steers; the questions propounded being as follows: "Q. Do you remember having a conversation with Mr. Johnston with reference to those steers? If so, what was it? (Objected to, sustained, and defendant excepts.) Q. In this conversation which you had with him, did or did not the defendant, Frank Johnston, state to you that the steers which he was driving, one of which was a pale red steer, did not belong to him, that he had nothing to do with him, that he was only driving them for his brother, and that if you wanted to purchase them, or make any trade with reference to them, you would have to see his brother? (Objected to, sustained, and defendant objects.)" Another witness, Asher, was introduced by defendant, and was not permitted to testify to a similar conversation had with defendant.

W. H. Maybin, for appellant.

The court will note that throughout the entire transaction there is not a suggestion in the evidence that the appellant was a party to any of the happenings, however remote, in connection with the steer, except that he was hired to drive it and did drive it; that he had nothing to do with the sale to Dennis, the butcher, that he received none of the proceeds of the sale; that he was not present at the sale; and knew absolutely nothing about the transaction, except as the hired driver for Arthur Johnson. No state witness testified to any fact that would suggest a conspiracy between Arthur and Frank Johnston to steal the steer. The state witness on the other hand testified that the appellant had absolutely no connection with the transaction other than heretofore stated. This was the state's whole case.

On cross-examination, the district attorney perhaps over-zealous to secure the conviction of the appellant committed an error sufficient to reverse the case. Under the statute it is competent to examine a witness touching his conviction, but when he has answered the questions categorically, that is an end to the matter and it is erroneous to permit the district attorney to go into detail. In this case over the objection of the appellant, the district attorney was permitted not only to ask the appellant if he had ever been convicted of violating the law, but the district attorney was permitted to go into details extending over a number of years. This was error, it is respectfully submitted, and then the district attorney asked the appellant if he was not known as "Hangman Johnson" and if he had not hanged forty-three men. It is true that an objection to these two questions was sustained and the jury instructed to disregard these questions. But the evil had been done and after the impression had been created that the appellant was an exceedingly bad man.

Frank Johnston, assistant attorney-general, for appellee.

The testimony offered in regard to the alleged conversation between Quintini, the witness, and Arthur Johnston, was clearly incompetent from every point of view. Arthur Johnston was not on trial in this cause, and if he had been, his conversation, or alleged conversation, with Quintini, in regard to this alleged crime was wholly incompetent to be introduced by the appellant. I submit the same objection to the court in regard to the rejected testimony of Joe Favre, a witness.

As to the other objections arising on the cross-examination of the defendant by the district attorney, I submit that the action of the trial judge in permitting this line of cross-examination was perfectly correct. This defendant was a witness against the state in his own behalf, and certainly within the limits of cross-examination; the state had a right to cross-examine him in regard to his former convictions, all of which matters were pertinent to the question, and especially to the question as to the value of his testimony before the jury. On these lines the widest latitude is always allowed by the trial judge in the cross-examination of witnesses.

The objection doesn't reach the point that he could have asked him if he had been convicted of cattle stealing on former occasions, but a very different question, namely, whether he could not be cross-examined in regard to the circumstances attending these transactions. If the one was admissible, the other was clearly competent, and the entire cross-examination along this line was for the purpose of ascertaining from the witness, by cross-examination, all the information necessary for the jury to enable them to arrive at a fair estimation of the value and probative force of this testimony.

WHITFIELD, C., delivered the opinion of the court.

The court below erred in excluding the testimony of Emile Asher and Frank Quintini as to the conversations, between the appellant and them, respectively, touching the steer whilst being driven into the market. These declarations were made at a time when there was no reason to suppose that they were being manufactured for the purpose of exculpation. They were not self-serving declarations, within the true meaning of that principle of the law. They were explanatory of the custody or possession then had by the appellant whilst driving the steers into market. See Wharton's Criminal Evidence (10th Ed.), vol. 2, sections 691, 692, and *Penn v. State*, 62 Miss., at the bottom of page 474. This testimony was vital to the defendant's case, and under the circumstances under which it was given is entirely free from any suggestion that it was manufactured, in view of any trial to be had, and is entirely competent under the authorities cited.

It was improper, on the examination of the defendant, to ask him if he was known as "Hangman" Johnston, and if he had not hanged forty-three men; but the learned court below promptly sustained an objection to these two questions and excluded them from the jury.

PER CURIAM. The above opinion is adopted as the opinion of the court, and, for the reasons therein indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

LESLIE HURST v. STATE.

[58 South. 206.]

1. CARRYING CONCEALED WEAPONS. *Criminal prosecution. Defenses. Evidence. Code 1906, section 1105, paragraph "A."*

A defendant charged with carrying a deadly weapon concealed can, under Code of 1906, section 1105, paragraph "A" so providing, show as a defense that he was threatened and had good reason to and did apprehend an attack and in such case it is not necessary for defendant to prove either that he himself heard or that the party who informed him heard the other party make the threats. The only thing necessary is that the party indicted was informed and so believed that he had been threatened and that he had good and sufficient reason to apprehend a serious attack from the party making the threats and that he did so apprehend.

2. SAME.

The question as to the good faith with which a defendant, charged with carrying concealed weapons, carried the weapon is a question for the jury.

APPEAL from the circuit court of Pike county.

HON. D. M. MILLER, Judge.

Leslie Hurst was convicted of carrying a concealed deadly weapon and appeals.

The facts are fully stated in the opinion of the court.

Clem Ratcliff, for appellant.

On motion of the district attorney, the court excluded all the testimony of Ford, including of course both threats—the one at the mill in February and the one at church on the day of the trouble. The court gave as its reason, the same as assigned in the objection, viz., that the first threat had coupled with it a condition, that if defendant was ever caught or seen around his house, etc., and this trouble being four miles from McLean's house, therefore defendant could not have had the pis-

tol for protection against that threat. We answer this objection and ruling of the court, by referring to the statute itself, as above referred to, which does not say that threats shall not be a defense for this charge when made by a husband to deter a man from "fooling around his wife." The statute is general, and applies to all threats which furnish a good and sufficient reason to apprehend a serious attack from an enemy, and that he did so apprehend, and does not provide an exception such as indicated by the objection of the district attorney and the ruling of the court—that if the threatened person was "fooling around one's house or wife," then threats shall be no defense. The only requirement of the threats, or the nature of them, is that they are such as furnish a good and sufficient reason to apprehend a serious attack by an enemy and that he did so apprehend, without other qualification or condition. They, the threats, need not be given at a particular place, nor designed to take place at any particular time or place or way. See *Sudduth v. State*, 70 Mo. 250: The court also excluded the other threat testified to by Ford, as having been made on the day of the shooting and just before the shooting. The court said this threat was excluded for the reason that it was not communicated to defendant until he reached the church where the shooting occurred, and he had the pistol before he got to church, and before he knew of that threat and hence he could not have had the pistol to protect against that threat. This threat is competent under *Murdin v. State*, 82 Miss. 507. See full opinion. We submit that this rule draws the line too closely and too narrow. This threat is eminently competent, material and relevant, especially so since the defendant had already been advised of other threats by the same party, and he knew that he was going to that immediate community that day and that he would likely see the said McLean there.

Frank Johnston, assistant attorney-general, for appellee.

The action of the court in excluding this threat is criticized by counsel in his brief, and he cites two cases, decisions of this court, in support of his contention. I will notice them briefly.

In the *Monroe Sudduth case*, 70 Miss. 250, the point was not involved as presented in this case, and that case presented no question of a conditional or unconditional threat, but the case went off on a different question. The court below fell into the error of holding that an apprehended attack did not justify the carrying of a concealed weapon, unless he had reason to believe that, upon the particular occasion, or at the particular time, as distinguished from other occasions and times, he will be attacked.

In *Murdin's case*, 82 Miss. 508, the defendant had been threatened, and threats had been communicated to the defendant, and there was the testimony of one witness to the effect that these threats had been communicated to the defendant. The error upon which this case was reversed was in the instruction for the state which made the conviction depend upon the fact that the weapon that the defendant carried was concealed, and it did not contain the qualification that if the jury believed that he carried the weapon because of the threats that had been made against him, that he was justified in carrying a concealed weapon; so that this case may be disregarded as bearing any weight upon the question now before the court.

In *Abbott's case*, 68 So. 124, Kentucky Decisions, the threat was that if the defendant married his (the appellant's) sister, he would kill him. That was a conditional threat, but it was proved further in the case that the man did marry the sister, and therefore, the condition of the threat had been fulfilled, and in fact the

man was killed the day after he was married. That evidence was treated by the court, as competent, and it seems to be placed on the distinct ground, that while the threat itself was conditional, yet the circumstances constituting the condition upon which the threat was predicated had actually happened. The reasoning of the opinion seems to be that the happening of the condition contained in the threat is necessary to be proved in order to render the conditional threat competent.

In *Sloan's case*, 22 Mont. 293, the threat that was made was that if the deceased wanted any trouble, he could get it. That could hardly be regarded as a conditional threat and was competent evidence. Its probative force being, of course, a matter entirely for the jury.

In *Phillip's case*, 62 Ark. —, the man's wife had been staying away from home against his protests, and he said that if his wife did not stay at home, that he was determined to kill her. The court held that this was competent evidence, but that can scarcely be regarded as a conditional threat, as it was more an expression showing the state of his feelings, and the animus towards his wife, and the grievance that he had against her.

In *Johnson's case*, 76 Mo. —, the threat was that if he fooled with him, that he would fix him, and that was held to be competent. This scarcely arose to the dignity of a conditional threat, in my opinion.

In *Jordan's case*, 79 Ala. 9, a threat was made a few minutes before the difficulty to kill any one who "hits 'M.' " This threat was regarded by the court as a conditional threat, but the court said in its opinion, that it was admissible although it was a conditional threat, when it was further shown by the proof that the deceased soon after the threat, actually struck him, and the difficulty at once occurred. The ground of the deci-

sion in this case seems to be the additional proof that the condition upon which the threat was made had actually occurred, and that this made the conditional threat admissible.

There is a case of *Reed v. State*, 68 Ala. 492, where it was held that "whatever may be the force of the threat, whether absolute or conditional, whether it indicates a purpose only contemplated or fully matured, is admissible in evidence, the court placing the ground of the decision upon the point that such evidence indicated the state of mind of the accused.

As a question *a priori*, I submit to the court for its consideration that an analysis of the ground upon which this rule might rest would eradicate the threat which is clearly conditional, unless it is shown that the conditions indicated in the threat have been fulfilled.

McLEAN, J., delivered the opinion of the court.

The appellant was tried and convicted for the carrying of a deadly weapon under sections 1103 and 1105 of the Code. Mose Hurst testified that he heard many threats made by Charlie McLean against the appellant, and that he had communicated these threats to the appellant; that he heard the threats rumored, and knew that they were general and serious, and so stated to the appellant. Upon cross-examination this witness testified that he himself had not heard McLean make the threats, but that one Enoch Williams had so informed him; and it developed upon the trial that Enoch Williams was present in the court room during the trial of the cause, and was not put on the stand to testify. Thereupon the court sustained the objection of the state to the testimony of this witness as to his having heard of the threats, and as to his having communicated these threats to the appellant. The evidence discloses that there had been bad blood between the appellant and

McLean, and, further, that the first time these parties met after the threats had been communicated to the appellant, appellant and McLean became engaged in a shooting scrape; that this difficulty was brought about by McLean, and that he, McLean, a very short time before the difficulty occurred, in fact on the very morning of the difficulty, had made threats against the appellant.

It was error for the court to exclude the testimony of Mose Hurst to the effect that he had heard of the threats, and that he communicated them to the appellant. It is not necessary for the party to prove either that he himself heard, or that the party who informed him heard, the other party make the threats. The only thing necessary is that the party indicted was informed and so believed that he had been threatened, and "that he had good and sufficient reason to apprehend a serious attack from the party making the threats, and that he did so apprehend." The whole object and purpose of the statute is that if the party in good faith honestly believed that the threats had been made, and coupled with this threat "he had good and sufficient reason to apprehend," etc. The proof of the threat is made out by showing that the party on trial, and who is charged with carrying a deadly weapon, was informed and sincerely and honestly believed that the threat had been made. Mere idle rumors are not sufficient, but, when the information is brought home to the party charged that he has been threatened, this as to him is proof of the threats. It must be borne in mind that the party making the threats is not on trial, and his interests are in no way affected. The object and purpose of the statute in permitting the party to carry a deadly weapon is in order that he might protect himself against the attack of his adversary; and, if it became necessary, before the party has the right to carry the weapon, that he trace down to its fountain source the truthfulness of the threat, he

might be deprived of his right to guard against the threatened attack.

After all, the question as to the good faith with which the party carried the weapon is a question for the jury.

Reversed.

MAYES, C. J. (dissenting).

It is my judgment that the opinion of the majority is wrong, and I therefore feel compelled to dissent. The appellant is prosecuted for carrying concealed weapons, and the evidence leaves no doubt as to the charge being completely made out by the evidence. The defense is that appellant was justified under the law in carrying the weapon concealed because he was threatened at the time, and had good and sufficient reason to apprehend an attack from an enemy, and that he did so apprehend. Referring to the statutes under which this prosecution and defense is made, they are sections 1103 and 1105 of the Code of 1906. Section 1103 prohibits all persons from carrying concealed weapons, but section 1105, par. "a," allows any person indicted for a violation of section 1103 to show as a defense that the person charged "was threatened," and "had good and sufficient reasons to apprehend a serious attack from an enemy," etc. It is under this clause of section 1105 that appellant rests his defense, and, in order to prove the threat, he introduces Mose Hurst, his father, who undertakes to tell that one Enoch Williams told him (Mose) that McLean had threatened to kill appellant. No threats had been made to Mose, and he knew nothing of any threats ever having been made other than what he says Enoch Williams told him. The trial court excluded this testimony on the motion of the state, and it is my judgment that the trial court's action was proper because such testimony was hearsay pure and simple. In justification of carrying concealed weapons the statute requires proof that the party charged with the violation prove that he

was threatened—actually threatened. This proof can only be made by the persons to whom the threats were made. The threat is a fact to be established, and, like all other facts, it must be established by persons having actual knowledge of the fact, and cannot be established by hearsay. This is the universal rule of law as I understand it. If the jury were called upon to place credence in the story of Mose Hurst, they must rely, not on any knowledge that Mose had of any threats having been made, but on the fact that Enoch Williams told him what Mose said he did, and the further fact that threats were actually made to Enoch Williams by McLean against the life of appellant. If testimony of this character is admissible to prove threats, there can be no limit placed on the chain of communication, and the witness to whom the threats were actually made may be one hundred times removed from the actual witness on the stand. In other words, the threats may be claimed to have been made to person No. 1, who communicated what No. 1, told him to No. 2, who, in turn, told it to No. 3, and so on down, until it reaches person No. 100; and this last person may be put on the witness stand to prove the threats. This is the practical holding of the court as I see it.

The majority opinion says that “the object and purpose of the statute is that if the party in good faith honestly believed that the threats have been made, and coupled with this threat, has good and sufficient reason to apprehend an attack, etc., the proof of the threat is made out by showing that the party on trial and who is charged with carrying the deadly weapon was informed, and sincerely and honestly believed that the threat had been made.” I am utterly unable to comprehend how “the proof of the threat” can be established, as the statute says it shall be, “by showing that the party on trial and who is charged with carrying the deadly weapon was informed and sincerely and honestly

believed that the threat had been made.” The statute plainly says that, in order to make out a defense under the statute, the party charged must show “that he was threatened,” etc.; but the majority opinion says “it is not necessary for the party to prove either that he himself heard, or that the party who informed him heard, the other party make the threats.” I cannot understand how threats can be proved except by persons who heard them. Under the terms of the statute, it is not sufficient to justify that a person have “good and sufficient reason to apprehend a serious attack,” but such person must in addition be “threatened” with same.

The majority opinion makes of section 1105 a different statute from the one enacted by the legislature. The legislature did not make the right to carry a concealed weapon depend upon any belief as to the existence of the justifying facts, which the party charged with carrying same may have in his own mind at the time, however sincerely and honestly he may entertain this belief, but his right to carry a concealed weapon depends upon the actual fact that he has been threatened; and, when he relies upon this defense, he must prove the facts by the parties who heard the threats made, and he can prove it in no other way.

I can comprehend no reason why hearsay testimony under this statute is any more admissible to prove the facts making the defense than is hearsay testimony in any other cause.

GULF & SHIP ISLAND RAILROAD COMPANY v. MRS. LAURA COLE.

[58 South. 208.]

CARRIERS. *Breach of contract. Damages.*

Where a passenger is negligently put off or allowed to get off at the wrong station, no case for punitive damages is made, unless there is some reckless, wanton, wilful, capricious or wrongful act done on the part of the agent or servant of the carrier.

APPEAL from the circuit court of Simpson county.

HON. W. H. HUGHES, Judge.

Suit by Mrs. Laura Cole against the Gulf & Ship Island Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

B. E. Eaton and May & Sanders, for appellant.

We were appalled when the trial court declined to apply to this case the principle so aptly stated and thoroughly discussed by Chief Justice Mayes in the opinion of the court overruling the suggestion of error in the case of *Railroad Co. v. Hardie*, 100 Miss. 132, 55 So. 967. Unless this court can be persuaded to reverse the *Hardie* case the refusal of the trial court to grant appellant's instruction No. 3, denying recovery of punitive damages and the granting of plaintiff's instruction No. 1, allowing recovery of punitive damages was reversible error. See, also, *Railroad Co. v. Hughes*, 50 So. (Miss.) 627; *Railroad Co. v. Purnell*, 69 Miss. 652; *Railroad Co. v. Fite*, 67 Miss. 373; *Dorrah v. Railroad Co.*, 65 Miss. 14; *Railroad Co. v. Faust*, 32 So. (Miss.) 9; *Railroad Co. v. Pearson*, 80 Miss. 26, 31 So. 435.

We respectfully submit that the facts of this case tested by the well-settled rule in Mississippi, fall far

short of making a case for punitive damages. In the *Hardie case, supra*, 55 So. 974, our court said:

In the first place in the case of *Railroad Co. v. Marlett*, 78 Miss. 872, 29 So. 862, this court held that, "A willful wrong that gives a cause of action for the imposition of exemplary damages, must be denoted by a wrongful act done with a knowledge of its wrongfulness." When under the facts of this case the conductor refused to back he was guilty of no wrongful act and no punitive damages should have been allowed. In the case of *Railroad Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373, a passenger was carried by his proper station by reason of the negligence of the conductor, it does not appear that a demand was made by the passenger for the backing of the train, but punitive damages was sued for and the court held that for a mere breach of duty no punitive damages could be assessed." See, also, *Railroad v. Dodds*, 53 So. (Miss.) 409.

It was negligence if the conductor erroneously advised plaintiff her station had been reached but such conduct did not amount to a "willful wrong . . . denoted by a wrongful act done with a knowledge of its wrongfulness." The truth is the plaintiff admits that every courtesy was extended to her by the train employees, that they were careful and polite in assisting her off, and all that is contended is that by mistake she was directed to get off at the wrong place. If she had known what the conductor under the facts in this record had a right to assume she did know, that is, that she would recognize her proper destination and would not get off until it was reached, there would have been no occasion for plaintiff to get off at the wrong place. In other words, she would have said to the conductor, "This does not look like Low, my destination," and the conductor, having his attention directed particularly to her position, would have discovered and avoided his mistake. Ap-

pellant owed plaintiff the duty to transport her to her destination, Low, and it breached its duty; but for a mere breach of duty no punitive damages can lawfully be assessed. Indeed, under the facts of this case, we think nominal damages is all that can properly be allowed. *Railroad Co. v. Lambert*, 54 So. (Miss.) 836; *Railroad Co. v. Drummond*, 73 Miss. 813; *Thompson v. Railroad Co.*, 50 Miss. 315.

Willing & Davis, for appellee.

The court very properly submitted the question of punitive damages to the jury. This is a typical case for the imposition of punitive damages.

As was said in the case of *Davis v. Railroad Co.*, 95 Mo. 542: "This was manifestly a case in which the jury should have been allowed to say whether, under all the circumstances there was such gross negligence on the part of the railroad company, such conscious indifference to the rights of the plaintiff and the public, as warranted the imposition of punitive damages, and, of course, as a consequence, if punitive damages were allowed, such a case as warranted damages for mental suffering."

In order to justify the imposition of punitive damages against common carriers it is not necessary to prove intentional wrong or insult. It is sufficient if negligence is shown so gross as to evince a reckless disregard of plaintiff's rights or conscious indifference to the rights of the plaintiff.

The rule as to punitive damages is stated in the case of *Manufacturing Co. v. Marlett*, 78 Miss. 872, as follows:

"It has been held in this case that punitive damages may be recovered only in case where the acts complained of are characterized by malice, fraud or willful wrong, evincing a disregard of the rights of others." The

courts have uniformly held that gross negligence is tantamount to willful wrong and justifies the imposition of punitive damages.

On the subject of punitive damages we call the court's attention to the following authorities: *Hurst's case*, 36 Miss. 660; *Kendrick's case*, 40 Miss. 374; *Railroad Co. v. Whitfield*, 44 Miss. 466; *Wilson v. Railroad Co.*, 63 Miss. 352; *Higgins' case*, 64 Miss. 80; *Dorrah v. Railroad Co.*, 65 Miss. 14; *Railroad Co. v. Fite*, 67 Miss. 373; *Railroad Co. v. Lowry*, 79 Miss. 431; *Telephone Co. v. Watson*, 82 Miss. 101; *Railroad Co. v. White*, 82 Miss. 120; *Railroad Co. v. Lanning*, 83 Miss. 161; *Railroad Co. v. Mitchell*, 83 Miss. 179; *Railroad Co. v. Harper*, 83 Miss. 561; *Telephone Co. v. Hiller*, 93 Miss. 658; *Burns v. Railroad Co.*, 93 Miss. 816; *Davis v. Railroad Co.*, 95 Miss. 540.

Argued orally by *Geo. W. May*, for appellant.

Argued orally by *C. H. Alexander*, for appellee.

MAYES, C. J., delivered the opinion of the court.

Mrs. Cole brought suit against the Gulf & Ship Island Railroad Company for damages, alleged to have been occasioned her by reason of the fact that she was allowed to get off of the train, or was negligently put off, by the servants of the company at the wrong station. In the declaration filed both actual and punitive damages are claimed, and on the trial an instruction was given for the appellee, authorizing the jury to award punitive damages. The jury returned a verdict for three thousand dollars, from which judgment the railroad company prosecutes an appeal.

The chief contention in this court for appellant is that the facts did not warrant the court in authorizing the jury to assess punitive damages. The facts are substantially as follows: Mrs. Cole lived about six miles

north of Magee, in Simpson county, and about twenty miles from a little station on the Gulf & Ship Island Railroad, called Low, and about the same distance from another little station on this same road, called Milltown. Milltown and Low are some two or three miles apart; Milltown being east of Low and nearer Soso, the point where Mrs. Cole boarded the train. It appears that Mrs. Cole was not familiar with the surroundings at Low or Milltown; while she had passed through twice, she had never been there. It is shown that on the 29th day of January, 1911, Mrs. Cole bought a ticket from Soso to Low, Milltown being the station nearest her starting point, and about three miles from Low; the train, of course, reaching Milltown first. Mrs. Cole had been on a visit to a sick sister at Soso, and on the above date was returning home, and was expecting to be met at Low by a son and nephew, with a team to take her home that evening. Mrs. Cole had with her a baby about seven months old, a basket, a cloak, and a small grip. When the train reached Milltown, she says "the train stopped, and the conductor came through and hollowed 'Low,' and when he got where I was, he picked up my baggage, and I followed him, and he set my baggage down on the ground and got back on the train and it pulled out." She then says she stood a while, thinking she was at Low, as she had never been there before. Gathered at the stopping point of the train were some boys, and Mrs. Cole asked them if there was any team there to meet a lady. There were no houses at Milltown; nobody living there, and no depot and no shelter. The day was fair, but cool. She arrived at Milltown late in the evening, about 4:30 or 5 p. m. She asked the boys if they would go with her to where she could get shelter; and one of them said he would go with her to Mr. Charley Butler's house, as it was right on his way home. She states that she had known Mr. Butler,

and after going to his home she got him to telephone to her home folks that she was there. In going to Mr. Butler's house, she had to go through the millhouse and a little swamp; that there was just a muddy pathway up a plank to the millhouse and on out through the gate into the big road. In going to Butler's which was about a mile, or a little over, she carried the baby and part of her baggage, and the boy carried a part of it. The son received the telephone message and came on over where she was for her, reaching there about 10 or 11 o'clock that night. Mrs. Cole did not stay with Charley Butler, but stayed at Mr. Alvy Butler's, and was well taken care of, and reached her home about 1 o'clock the next day. Mrs. Cole states that on account of the walk, etc., she was made sick, had cold, tonsilitis, and fever, and aching bones, and remained in this condition about a week. After Mrs. Cole reached Charley Butler's, she went to Mr. Alvy Butler and his wife, on the invitation of the latter, because she had formerly lived by them, and they wanted her, and because they said they had more conveniences to take care of herself, son, and team than at Charley's. Mrs. Cole states that she lived twenty miles from Low, and if she had gone to Low and gone out in the buggy to her home she would not have reached home as early as she reached the home of Mr. Butler. This is substantially the testimony of Mrs. Cole.

The testimony of the boys who were at the Milltown station is of little importance in the consideration of this case. They merely verify the fact that Mrs. Cole got off at Milltown, and that the conductor helped her off, and that one of them went to Mr. Butler's with her and helped her carry some of the baggage. None of the witnesses claim that there was any impoliteness, rudeness, or misconduct on the part of the servants of the railroad company; the cause of complaint being that

Mrs. Cole was put off at the wrong station, as she says, by the conductor.

While it is not important, in the consideration of this case, to consider the testimony of appellant on the question involved, since if appellee's testimony warranted the submission of the question of the allowance of punitive damages to the jury, this case must be affirmed, still, in order to more completely state the case, it is not amiss to say that the conductor was put upon the stand, and by him it was shown that the train was due at Low at 4:38 p. m., and was about on time. This would place it at Milltown ten or fifteen minutes earlier. The conductor states that the train stopped at Milltown, and two other passengers got off, a Mr. Beavers and wife. The conductor states that after reaching Low, as he had a lady and child to put off there, he spoke to the flagman, and that employee told him the lady got off at Milltown; and the conductor states that this was the first he knew of it. The conductor denies that he assisted Mrs. Cole off at Milltown, and denies that he called any stations, but stated that it was the flagman's duty, and when the flagman reached Milltown he called "Milltown," not "Low." The testimony of the flagman is about the same as that of the conductor. The flagman states that when he reached Milltown he called that station by its proper name, and several passengers got off; that he helped Mrs. Cole off.

Mr. Beavers testified that he was on the train and got off at Milltown with his wife; that Milltown is a regular flag station; and that he remembers seeing a lady get off there. Beavers also states that there is quite a difference between the appearance of the stations of Low and Milltown; that at Low there is a depot, sawmill, and several buildings; at Milltown there is nothing but a store and an old sawmill. The testimony of Mrs. Beavers is about the same as that of her husband, except

that she had a conversation with Mrs. Cole and Mrs. Beavers says that Mrs. Cole looked a little lost. Mrs. Beavers testified that she asked her, "Are you looking for some one to meet you here?" and Mrs. Cole replied, "I am looking for my husband."

The facts of this case, when considered only on the testimony of Mrs. Cole, make no case for the infliction of punitive damages. The very most that can be said is that the servants of the railroad were only negligent. If it be true that Milltown was called Low by the flagman, or by the conductor, not a fact surrounding the case warrants the inference that, in miscalling the station, the servant of the company acted with recklessness, or in willful or capricious disregard of the rights of appellee. In the case of *Y. & M. V. R. R. Co. v. Hardie*, 55 South. 967, 34 L. R. A. (N. S.) 742, we had occasion to review all the cases on the subject of punitive damages, and to restate the rule on this subject in this state. We shall not go over that ground again.

The case of *Y. & M. V. R. R. Co. v. Hughes*, 50 South. 627, is a similar case to this, except that its facts make the case a stronger one for the allowance of punitive damages than the case now before the court; but this court held, in the Hughes case, that no punitive damages could be recovered. An examination of the original record in the Hughes case shows this. It appears that Mrs. Hughes sued the Yazoo & Mississippi Valley Railroad Company for ten thousand dollars actual and punitive damages, and recovered a judgment for two thousand five hundred dollars. The facts show that about 4:30 o'clock on Sunday afternoon Mrs. Hughes boarded the Yazoo & Mississippi Valley train at Vicksburg, bound for Natchez, and that she had never been on the line before, except once, and was thoroughly unfamiliar with the stops and stations on the line. The ticket carried her from Vicksburg, via Harriston, to Natchez; and

at Harriston she was to make a change. She had with her a suit case, a little girl five years old, and a baby nine months old. Further stating the case in the language of Mrs. Hughes, she was asked on the trial: "What happened after you left here [Vicksburg]? State whether or not the conductor took up your ticket, or punched it. Yes, sir; took my ticket and gave it back to me. What did you do, and what happened? Well, I sat there and taken care of my babies and myself until the flagman, I judge from his looks, came in and called out the station, and I didn't understand what he said, and I said, 'Is this Harriston?' I said, 'Is this Harriston?' And he said, 'Yes, ma'am,' and he pushed the door and came up to me, and I said, 'Is this Harriston?' And he said, 'Yes, ma'am,' and he picked the suit case and the little girl and hustled to the door with them, and I came behind them. What did you have? The baby; and when I got down off of there the train had pulled out, and I saw a bunch of negroes around, and I said, 'Is this Harriston?' to one of them, and he said: 'No, ma'am; you are a long ways from Harriston.' And I said: 'What shall I do, and where shall I go?' And I said, 'Is there any white people around here?' And he said: 'No, ma'am; there is one white man at the store, and he will soon be gone.' And I got the little girl and hustled over to the store, and told him what had happened, and he said, 'Go in the office and sit down,' and said, 'When I get through, I will see what I can do for you.' And when he got through his wife suggested the only thing to be done for me was to drive me back home, as there was no one to stay with; and he said, 'You better drive back home and get a start in the morning again.' Were you driven back? Yes, sir. What time did you get to your home? About 8 o'clock, I think. About that time, as near as you remember? Yes. Just tell the jury what

your feeling was; what you experienced when you saw the train had gone, and you were put off at Glass Station, instead of Harriston? I became so nervous and excited and shocked almost to death to think I had been put off that hour in the evening with two little children, almost helpless and at night, with nothing but negroes around, and I said: 'What in the world will I do? Will I have to stay here all night with these negroes?' And when I got home I couldn't eat or sleep, and the next day, even although I left next day on my journey, but I really was not able to, but because I was compelled to go. You say that night— How did you suffer? I had a severe headache and nervous. I couldn't sleep, and I had to get up and light the lamp; and every time I closed my eyes I was being put off the train, and I had to get up. And I didn't sleep any for two or three nights, because the idea of being there with the two babies made me feel terrible; a baby nine months old having to be out at night and among strangers, and no place to go, was nearly more than I could stand."

It is needless to further quote from the testimony in the Hughes case. The court, in the Hughes case, speaking through Judge Whitfield, said: "Manifestly this is no case for the imposition of punitive damages. It was therefore fatal error to refuse the defendant the sixth instruction, charging the jury not to award punitive damages." The case now on trial cannot be affirmed without overruling the Hughes case, and we feel no inclination to do that. When a passenger is negligently carried by his proper station, or put off or allowed to get off at the wrong station, no case for punitive damages is made, unless there is some reckless, wanton, willful, capricious, or wrongful act done on the part of the agent or servant of the road.

But appellee relies on the case of *Davis v. Y. & M. V. R. R. Co.*, in 95 Miss. 540, 49 South. 179. In the argu-

ment of the Hughes case, counsel in the case relied on the Davis case, and cited it in his brief. The same judge delivered the opinion in both cases, and, although the Davis case was decided long prior to the Hughes case, this court took the view that the two cases were entirely distinct. The Davis case carried the doctrine of the right to recover punitive damages as far as it should be carried in this character of case. In the Davis case, the facts show that Davis was a passenger, and requested to be put off at a flag station called Etta. The conductor had never been over the particular line before, because it was new, and yet, assuming to know all about it, told Davis that the train was going over a new route a short distance from the old, but the flag stations on the new route had corresponding names, and that he would put him off at the new station of Etta, only a short distance from the old. Davis explained to the conductor that a buggy would meet him at Etta, and the conductor told him that the distance was short, and he could walk to the old station and intercept the buggy. It was after dark, and the station, Etta, was called, and the conductor told Davis they had reached Etta. Before getting off, however, Davis told the conductor that he was not familiar with the ground, and wanted to be certain that this was his station. Although the facts show that the conductor knew nothing about it himself, yet he assured Davis he was there, and allowed and thus induced Davis to leave the train. Davis attempted to exercise every precaution to be put off at his proper station, and emphasized this to the conductor, and yet, despite all this, the conductor put Davis off at the wrong station; and the court held, under these circumstances, that the facts showed such utter disregard of the duty of the conductor that the question should have been submitted to the jury as to whether or not punitive damages should have been allowed. In this case, there is

nothing of this in the record. Mrs. Cole was simply put off, or was allowed to get off, at the wrong station by the mere neglect of the servants in charge of the train.

The case of *Southern Ry. Co. v. Phillips*, 136 Ga. 282, 71 S. E. 414, is very similar to this. The facts show that Mrs. Phillips sued the Southern Railway Company for damages for being put off at the wrong station. It appears that she bought a ticket and boarded the passenger train at Brunswick for Empire. In making this journey, it was necessary for her to change cars at Jesup. She was accompanied by a small child, and carried a valise. After she had been traveling for some time, and as the train was slowing up for a station, the conductor announced that it was the place for Mrs. Phillips to leave the train, at the same time taking up the baggage and directing her, with the child to follow him. Acting upon the direction of the conductor, she left the train, which, as soon as she disembarked, rapidly moved away, leaving her in darkness. The place where she was put off was Odessa, a place five miles south of Jesup, without depot accommodations or other accommodations for her safety. It was ten or eleven o'clock at night when she left the train, and for some time the only persons she saw were some negroes. She was very much frightened, and after some time had elapsed a white boy was called to her by the negroes, whom she asked if there were any white people in the community; and he finally secured a place with his mother for her to spend the remainder of the night. Mrs. Phillips contended that the conductor, in causing her to leave the train at a point other than the right place, in the nighttime, was guilty of gross negligence and wanton and willful misconduct. When the conductor took up her ticket, she asked him if she did not have to change at some place between Brunswick and Empire, and he said, "Yes; you change at Jesup"—and told her the train was due to arrive at

Jesup about ten o'clock. Near that time, the conductor came through the train and called out the station, and she understood him to say Jesup. She was intending to ask some one before the train stopped if that was Jesup, when the conductor took up her valise and hatbox, and said, "Here is where you get off;" and when the train stopped *the conductor* assisted her to alight. She thought she was at Jesup until the train had left. She saw some negroes around the station, and also a white lady, who got off of the same train she did. When she got off of the train, she saw a switch light, and started in that direction, thinking it was the depot. She asked the lady who got off of the same train with her where she was going, and she replied she was going home; and she asked her where to go to take the next train, and she said, "Go down there and ask them," waiving to the place where some negroes were. She asked them, where to go to take the next train, and they replied there would be no train until the next morning, and said: "You think you are at Jesup, but this is Odessa." She inquired where she could spend the night and they directed her to the captain's house. She was invited to spend the night with a lady, and did not go to sleep until about four o'clock in the morning on account of the fright brought about by being put off of the train under the circumstances she narrated; and the next morning she boarded the train, and was carried to her destination on the same ticket. The servants in charge of both trains treated her civilly and politely, and the question in the case was whether or not she was entitled to punitive damages.

The trial court instructed the jury that they might assess punitive damages, and the court in reviewing the case and reversing it, said: "We are at a loss to see, from the facts as narrated by the plaintiff, any circumstances of aggravation authorizing the recovery of pun-

itive damages. According to her own testimony, the agents of the railway company were civil and courteous in their treatment of her, and her being put off at the wrong station was the result of a mistake. It is her contention that the conductor told her that she had arrived at the place where she was to change cars, and invited her to get off, and that she got off at the wrong station on his invitation. If the conductor's version of the incident be accepted as true, the plaintiff misunderstood the station, announced 'Odessa,' to be 'Jesup,' and voluntarily left the train. Be that as it may, it is clear from both viewpoints that the plaintiff's leaving the train at Odessa was the result of a clear mistake. There is not a line in the evidence which indicates that any servant of the defendant company was influenced by any improper motive, or impelled by any desire to injure or to willfully discommode the plaintiff. The charge on the subject of punitive damages should not have been given."

The case of *Moss v. Mo. Pac. R. R. Co.*, 128 Mo. App. 385, 107 S. W. 422, from the Missouri Court of Appeals, is directly in point. The evidence in the Moss case showed that the plaintiff was a stranger on the line of railway, and that, while entitled to passage to a station called Mora, he was told by defendant's servants to get off at a place called Dumpville, five miles distant. It was night and raining, and plaintiff, being a stranger, accepted the statement of the servant in charge of the train as to Dumpville being Mora and got off, and did not discover the mistake until the train had left. The court held that this was no case for exemplary damages. To the same effect is the case of *C. C. C. & St. L. Ry. Co. v. Quillen*, 22 Ind. App. 496, 53 N. E. 1024, and the case of *Tennessee Central R. R. Co. v. Brashears*, *Guardian*, Kentucky Court of Appeals, 97 S. W. 349.

After a most thorough search of the authorities, we have not found one case that authorizes the recovery of

punitive damages under the facts of this case. The *Davis case*, in 95 Miss. 540, 49 South. 179, is nearer so holding than any case we have been able to find, or that counsel for appellee cite.

The instruction authorizing the jury to assess punitive damages in this case was erroneous, and the case must be reversed and remanded.

Reversed and remanded.

McLEAN, J. (dissenting).

The record presents a case where the question of punitive damages was properly left for the consideration of the jury. The record shows that the conductor was familiar with the stations on the railroad; that the train arrived at Milltown before dark, and the conductor testified that Milltown and Low were very dissimilar in appearance; that there was a mill at Low, and that there was nothing at Milltown; that there was also a depot at Low and a sawmill and some residences on the hill, close by and in plain view, but there was nothing in sight at all at Milltown. In other words, it is apparent from the record in this case that there was no possible chance for the conductor to be mistaken; that the place at which the plaintiff was put off was not her point of destination. The conductor was bound to have known that the train had not reached Low. Even a casual glance by the conductor at his surroundings, when the plaintiff was assisted off of the train, would have disclosed that the station was not Low, but some other station. This was the first time the plaintiff ever was at either Milltown or Low; she did not know one station from the other. She was dependent entirely upon the trainmen for information. If the appellant can escape punishment for its conduct in this case, it is difficult to conceive of a case where punitive damages could be allowed, except where the evidence is clear, positive, and distinct

of the *purpose* and *intent* to inflict a wrong. Such is not the law, as declared by all of the authorities. Whenever the evidence is such as to evince a reckless disregard of consequences, or when there is a conscious disregard of the rights of others, it is universally held that such conduct is gross, and authorizes the imposition of punitive damages.

The leading case in this state upon the subject of exemplary damages, and one which has been followed without one discordant note, and where the distinction is clearly drawn between acts which do and which do not justify the imposition of exemplary damages, is *Chicago Railroad Company v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373. In that case, the plaintiff took passage at night on defendant's train from Grenada to Torrence, holding a ticket to the latter place. Shortly before the train arrived at Torrence, the conductor became involved in an altercation with some immigrants who, by mistake, had gotten upon the wrong train, and also with a passenger who, without authority, had pulled the bell cord. Thrown off of his balance by these occurrences, the conductor carelessly and negligently permitted the train to run by Torrence without stopping, and was several miles beyond the depot before he recognized that there were several passengers on board for that point. The conductor took up the plaintiff's ticket before reaching the next stop, Coffeeville, made to him a statement of the troubles with the immigrants, and with the person who had rung the bell cord, as an explanation and excuse for his own negligence in failing to stop at his place of destination, and promised to make arrangements for the speedy return of the plaintiff from Coffeeville without charge. In that case, the lower court authorized the jury to assess punitive damages. This court, reversing the judgment in the court below, says that, "by a long train of decisions in this state. which simply an-

nounce the rule everywhere recognized such damages are permissible only where there has been some element of intentional wrong, or, in the absence of intention, a negligence so gross as to evince a reckless disregard of consequences." A careful and analytical examination of this opinion will disclose that carelessness in the sense of forgetfulness, something to which mankind generally are prone, excludes the essential idea of reckless conduct. *Scurr's case, supra*, may be said to be a case of momentary forgetfulness, caused or produced by the party's attention having been attracted by other matters relating to his business, and hence negatives any willfulness or recklessness.

There is no conflict between the case of *Y. & M. V. R. R. Co. v. Hughes*, 50 South. 627, and *Davis v. Railroad Co.*, 95 Miss. 540, 49 South. 179. These opinions were written by the same judge. In *Hughes* case, the destination point of the plaintiff was Harriston. The flagman came through the car and called the station Harriston, which was in fact Glass. Mrs. Hughes, thinking it was Harriston, arose and prepared to disembark. She testified that she asked the flagman if it was Harriston, and he replied, "Yes, ma'am," and assisted her to alight. It was a mistake, pure and simple. The flagman said that he called the station Glass; that he saw plaintiff standing in the aisle preparing to get off, and volunteered to assist her, without any knowledge as to her destination point. In that case the court held that punitive damages were not proper. In *Davis* case, the facts were that it was after dark, and the station Etta was called, and the conductor told plaintiff that they had reached Etta, and appellant then got off, but, before getting off, told the conductor that he was not familiar with the ground, and wanted to be certain that they were at his station. The conductor assured him that they were there, although the conductor himself

had never been over the new route. In that case, this court says: "This was manifestly a case in which the jury should have been allowed to say whether, under all the circumstances, there was such gross negligence on the part of the railroad company, such conscious indifference to the rights of the plaintiff and the public, as warranted the imposition of punitive damages."

The Davis case is on all fours with the case at bar. The conductor in this case says that he knew (indeed, he was bound to know) that the plaintiff's destination point was Low. She testifies that the conductor came through the cars and announced Low. When he got to where the plaintiff was, he picked up her baggage, and she followed him, and "he set my baggage down on the ground, and got back on the train, and it pulled out." This action on the part of the conductor was not simply an implied invitation to alight, but it was in the most emphatic manner an express invitation—in fact, it was practically a command—to alight. There is no evidence in the record that the conductor simply made a mistake in announcing the station, no evidence of momentary forgetfulness, and that this negligence was caused by anything, except inattention to his duties. But, even if he had made a mistake in announcing the station, and he really believed, when he carried out of the car plaintiff's baggage and assisted her in alighting, that it was her station, yet after he (the conductor) had left the coach and reached the ground the surroundings clearly indicated to him that the train was not at Low, and that it was some other point. The slightest observation would have informed the conductor that he was putting plaintiff off at the wrong place. The least attention—a mere glance at the surroundings—would have disclosed to him that he was putting this lady off at the wrong place. The court should not, under the circumstances, declare, as a matter of law, that the evidence was in-

sufficient to support the proposition that the conductor was guilty of gross negligence. These matters can be, and almost always are, established only by circumstances.

The day has long since passed when the question as to whether it is necessary, in order to recover punitive damages, for the evidence to be direct that the act was done intentionally or wantonly inflicted; but, upon the other hand, the proposition is well settled that, in the absence of intention or of a wanton injury, a negligence so gross as to evince a reckless disregard of consequences is sufficient to justify the imposition of punitive damages.

This court, in the recent case of *Railroad Co. v. Dodds*, 97 Miss. 869, 53 South. 409, says: "Punitive damages are only allowable when there exists some element of intentional wrong, or, in the absence of intention, there must be negligence so gross as to show a reckless disregard of consequences." This expression has been used so frequently by this court—in fact, scarcely a report can be found published within the last fifty years but what the rule as to the infliction of punitive damages is not laid down as in the *Dodds case*, *supra*, and not only by this court, but by almost every court in America—as to have become crystallized into a rule. *Railroad Co. v. Brown*, 77 Miss. 342, 28 South. 949. The difficulty lies, not so much in formulating a rule, but in applying the different facts and circumstances as they arise. It frequently occurs that the evidence is such as to justify the court in holding, as a matter of law, that punitive damages should not be inflicted. But whether the conduct is so reckless as to characterize it as gross, so as to justify the imposition of exemplary damages, is like the question of simple negligence or contributory negligence. In such instances, the rule is well settled that such questions

should be submitted to the jury, if there be conflict in the evidence, or if the facts be undisputed, and reasonable men may draw different conclusions therefrom. The rule has been stated in different language in different cases; but the substance is the same.

In *Nesbit v. City of Greenville*, 69 Miss. 22, 10 South. 452, 30 Am. St. Rep. 521; *Fulmer v. Railroad Co.*, 68 Miss. 355, 8 South. 517; *Alabama & V. Railway Co. v. Summers*, 68 Miss. 566, 10 South. 63; *Railroad Co. v. Jobe*, 69 Miss. 452, 10 South. 672, and *Railroad Co. v. Turner*, 71 Miss. 402, 14 South. 450, the rule is stated to be that, unless the evidence of negligence is so plain and convincing that all reasonable men would draw the same inference from the facts adduced, it is a question of fact for the jury.

In the recent case of *Southern Ry. Co. v. Floyd*, 55 South. 288, the rule is thus stated: "Where the facts are conceded, but the inference in regard to negligence is still doubtful, depending upon the general knowledge and experience of men, it is the judgment and experience of the jury, and not the judge, which is to be appealed to." And, again, in *Abernathy v. M., J. & K. C. R. R. Co.*, 97 Miss. 859, 53 South. 540, this court says: "It is a close case, an exceedingly close case, on the evidence; and because it is so exceedingly close and doubtful, because reasonable men might differ as to the question of contributory negligence under all the circumstances, for that very reason, the jury should have been left to solve the question."

In *Stevens v. Railroad Co.*, 81 Miss. 206, 32 South. 312, this court, quoting from *Bell v. Railroad Co.*, 87 Miss. 234, 30 South. 821, says: "So many questions are integrated usually into the solution of the question of negligence—it is so necessary to examine all the circumstances making up the situation in each case—that it must be a rare case of negligence that the court will take

from a jury.” While the judiciary always has, and it is to be hoped always will, represent the highest and the best thought of the age in which they live, yet it must be conceded that a jury, composed as it is of twelve men taken from the common walks of life, and who in their dealing and intercourse are daily and constantly brought in close touch to their fellowmen, are much better fitted and qualified to pass upon such questions than the judge whose duties require him to be at his desk, far removed from the busy hum of trade and traffic and the doings of men. The last quarter of a century has witnessed many changes in the law, especially upon those questions dealing with those that pertain to the functions of the judge, and those which pertain to the functions of the jury. In this country, the jury system may be said to be a distinctive product; and more and more the courts are recognizing the wisdom of leaving to the jury the decisions of questions like negligence, contributory negligence, and reckless conduct. We find this illustrated, not only in the modern rulings of courts, but in legislation of recent years, among which may be found our own statute (chapter 135, p. 125, Laws 1910), wherein it is enacted that “all questions of negligence and contributory negligence shall be for the jury to determine.”

The purpose of the legislature was that in all actions of negligence, whether gross, simple, or contributory, the question of negligence was to be left to the jury, if there be any evidence tending to prove the issue. It may be said that this was the rule without the statute. So it was; but this rule had not been observed by the courts in all cases, but in numerous instances the judge decided the question according to his own idea of what constituted negligence; and, in order to make the courts more careful in not trenching upon the province of the jury, and in not being so free and liberal with peremptory

instructions, this statute was enacted. Its purpose was to substitute, where reasonable men might differ, the opinion of the jury for that of the judge. It was a recognition of the truthfulness of the words of Holy Writ that "in a multitude of counsel there is safety." The court should, under this statute, charge the jury what is negligence, contributory negligence, or gross negligence, as the case may be, and then leave to the jury the application of the law thus announced, to the proven facts. This is what the statute means. Of course, if there be no evidence at all showing, or tending to show, negligence, the court still has the power to peremptorily charge the jury. The statute applies in this case, as the injuries complained of occurred after the passage of the statute. Its constitutionality was upheld in *N. & S. R. R. Co. v. Crawford*, 55 South. 596.

The writer of this opinion thinks that the verdict is excessive, and on that ground should be reduced, or otherwise reversed.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

MARCH TERM, 1911.

W. K. M. DUKATE ET AL. *v.* WIRT ADAMS, STATE REVENUE
AGENT.

[58 South. 475.]

1. APPEAL AND ERROR. *Review. Constitutional questions. Matters not necessary to decision. Constitution 1890, Sec. 147. Code 1906, Sec. 5004. Laws 1908, Ch. 204. Interlocutory order. Civil Cause.*

Under Constitution 1890, Sec. 147, providing that no judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annuled on the ground of want of jurisdiction to render said judgment or decree, etc., but that if the supreme court shall find error in the proceedings other than as to jurisdiction and it shall be necessary to remand the case, the supreme court may remand it to that court which in its opinion can best determine the controversy; the question of the constitutionality of the laws of 1908, chapter 204, conferring jurisdiction upon chancery courts of suits for penalties for violation of anti-trust laws, will not be determined unless the supreme court should reverse the decree of the court below for some reason other than that the cause was not of equity jurisdiction.

2. SAME.

Sec. 147 of the Constitution of 1890, applies to appeals to settle the principles of the case as well as to appeals from final decrees.

3. APPEAL AND ERROR. Jurisdiction. "Civil cause." Code 1906, Secs. 5004-1589. Constitution 1890, Sec. 147.

Notwithstanding the fact that Sec. 5004, Code 1906, imposing a penalty for violation of the anti-trust laws, refers to the violation of such laws as an "offense" and requires the circuit judges to call the attention of the grand jury to this provision, and section 1589 provides that "offense" when used in the statutes shall mean any violation of law liable to punishment by criminal prosecution; still as the penalty is to be recovered in an action in the name of the state on the relation of the attorney-general or district attorney, such action is a "civil" rather than a "criminal" action within Sec. 147 of the Constitution of 1890, providing that no judgment shall be reversed for error in bringing the same in equity or law, and an action for the penalty will not be reversed because brought in the chancery court.

4. EQUITY. Action for penalty. Pleading. Multifariousness.

A bill is not multifarious when the only relief sought by it is the infliction of a penalty prescribed by Sec. 5004, Code of 1906, and which alleges that the trust and combine charged to have been entered into by defendant was unlawful, as such allegation was the foundation of the right to recover the penalty.

5. PENALTIES. Forfeitures. Actions to enforce. By whom brought. Code 1906, Sec. 4738.

Although in Sec. 4738, Code 1906, providing that it shall be the duty of the revenue agent to sue all corporations "for all penalties or forfeitures for all past due obligations and indebtedness of any character whatever owing to the state or any county etc.," there is no comma between the words "forfeitures" and "for all past due" the statute will not be held to limit the right of the revenue agent to suits for penalties or forfeitures to those growing out of past due obligations of the state, but will be held to permit him to sue for any penalties or forfeitures.

6. STATUTES. Construction and operation. Mistake in punctuation.

While punctuation is a valuable aid in the construction and interpretation of a statute, it cannot control the plain meaning thereof, and the courts will disregard the same and repunctuate the statute if necessary, to give effect to what appears to be the plain meaning thereof.

7. ANTI-TRUST LAWS. *Penalties. Actions to enforce. By whom brought.*
Code 1906, Secs. 4738-5004.

Sec. 4738 and 5004, Code 1906, are parts of the same Code, were adopted at the same time, and must be construed together, and so construed, the authority granted to the attorney-general and district attorney by Sec. 5004 is not exclusive.

APPEAL from the chancery court of Harrison county.
HON. T. A. Woods, Chancellor.

Suit by Wirt Adams, state revenue agent against W. K. M. Dukate and others. From a judgment overruling a demurrer to the bill, defendants appeal.

The facts are fully stated in the opinion of the court.

Jeff Truly, Ford, White & Ford and *Edwin Thurrack*, for appellant, filed an elaborate brief fully covering all the points in the case but too long for publication.

E. J. Gex and *Flowers, Alexander* and *Whitfield*, for appellee, filed an extended brief, too long for publication.

Argued orally by *E. T. Merrick* and *Jeff Truly*, for appellant.

Argued orally by *J. N. Flowers*, for appellee.

SMITH, J., delivered the opinion of the court.

Appellee filed his bill in the court below, alleging that appellants, under the guise of a limited partnership, had entered into a trust and combine for the purpose of controlling the trade in sea foods in Mississippi, and praying that this partnership be declared to be an unlawful trust and combine, and that appellants be decreed to pay to the state the statutory penalty for having entered into such trust and combine. To this bill a demurrer was interposed and overruled, and this appeal granted to settle the principles of law governing the case.

The points relied upon by appellants to obtain a reversal of the decree rendered in the court below may be

reduced to three: First, that chapter 204 of the Laws of 1908 is unconstitutional, in so far as it attempts to confer jurisdiction upon the chancery court to hear and determine suits arising out of violations of the anti-trust law, for the reason that this anti-trust law makes the formation of a trust or combine a crime, and that under the Constitution the criminal laws cannot be enforced by the chancery court; second, that the bill is multifarious, for the reason that it unites two distinct and unconnected matters—that is, it seeks to have this limited partnership declared unlawful, and also to have penalties awarded for the violation of the anti-trust statute; third, that the revenue agent is without power to institute this suit.

Under section 147 of the Constitution, the question of the constitutionality of chapter 204 of the Laws of 1908 does not arise, unless we should reverse the decree of the court below for some reason other than that the cause was not of equity jurisdiction. It is true that this is an appeal to settle the principles of the case; but this section of the Constitution, nevertheless, applies, for it is not limited to appeals from final decrees. *Cazeneuve v. Curell*, 70 Miss. 525, 13 South. 32.

But it is said that this is a criminal and not a civil case, that, consequently, section 147 of the Constitution does not apply, and that the case of *Grenada Lumber Co. v. State*, 98 Miss. 536, 54 South. 8, which held to the contrary, was erroneously decided. Out of deference to counsel, we have re-examined this matter, in view of all of the arguments advanced by them, and see no reason to recede from the views expressed in the *Grenada Lumber Co.* case. In reaching this conclusion, we have not left out of view the fact that in section 5004 of the Code the violation of the anti-trust law is referred to as an “offense,” that section 1589 of the Code provides that “the term ‘offense,’ when used in any statute, shall mean any violation of law liable to punishment by crim-

inal prosecution," and that by the last sentence of section 5004 it is made "the duty of the several circuit judges of the state to specially call attention of the grand jury of their respective districts to this provision."

It may be that a person violating the anti-trust law is liable to punishment by criminal prosecution, as to which we express no opinion; but he certainly is not by reason of anything contained in section 5004, which imposes simply a civil liability. The language, "to be recovered by an action in the name of the state, at the relation of the attorney-general or district attorney," can be appropriately used only with reference to a civil case. Civil suits brought by the attorney-general or district attorney in their official capacity for the benefit of other parties are always brought in the name of such parties on the relation of the attorney-general or district attorney, as the case may be. Criminal prosecutions, under section 27 of the Constitution, and the laws enacted pursuant thereto, must be commenced, if in the circuit court, by indictment, and, if in the court of a justice of the peace, by an affidavit. In neither of these instances is the action thereby begun a proceeding "at the relation of the attorney-general or district attorney."

Prior to the adoption of the Code of 1906, there was no civil liability of the character now under discussion imposed for violations of the anti-trust law; such violations being punished by fine and imprisonment. When the Code of 1906 was adopted, the fine and imprisonment features of the statute were omitted, and the present civil liability substituted therefor. Section 5004 of the Code seems to have been adopted as a substitute for the latter part of Sec. 4, Ch. 88, of the Laws of 1900, which provided for a criminal prosecution, and directed the circuit judges to charge the grand juries relative thereto. Why this provision was brought forward in section 5004 is not clear, for the grand jury has nothing

to do with the collection of the penalty thereunder imposed. This may have occurred by an oversight, or out of a desire to retain as much of the phraseology of the old law as possible, and without due consideration of the effect thereof. But, be that as it may, this direction to the circuit judges cannot have the effect of converting into a criminal what was clearly intended to be a civil liability.

The bill is not multifarious. The only relief sought by it is the infliction of a penalty prescribed by section 5004 of the Code. In order that this may be done, the trust and combine alleged to have been entered into by appellants must be declared to be unlawful.

Section 4738 of the Code provides that the revenue agent "shall have power and it shall be his duty to proceed by suit in the proper court against all officers, county contractors, persons, corporations, companies, and associations of persons for all past-due and unpaid taxes of any kind whatever, for all penalties or forfeitures for all past-due obligations and indebtedness of any character whatever owing to the state or any county, municipality or levee board, and for damages growing out of the violation of any contract with the state or any county, municipality, or levee board, and shall have a right of action and may sue at law or in equity in all such cases where the state or any county, municipality or levee board has the right of action or may sue."

It is contended by counsel for appellants that under this section the revenue agent is not empowered to sue for all penalties and forfeitures owing to the state, but only for penalties and forfeitures for all past-due obligations, etc., owing to the state. This argument is based upon the absence of a comma between the words "or forfeitures" and the words "for all past-due" in the fifth line of the section. They seem to concede that, were this comma not absent, the revenue agent would have power to sue for all penalties and forfeitures. While punctuation is a valuable aid in the construction and in-

terpretation of a statute, it cannot control the plain meaning thereof, and the courts will disregard the same and repunctuate the statute, if necessary, to give effect to what appears to be the plain meaning thereof. If the contention of appellants is correct, the revenue agent would have no power to sue for penalties or forfeitures owing the state, except such as were incident to past-due obligations to the state; neither would he have any power to sue for past-due obligations, being limited to a suit for the recovery of the penalties and forfeitures incident thereto. It is manifest that the true intention of the statute is to confer upon the revenue agent the power to sue for all penalties and forfeitures of every character owing the state, and for all past-due obligations and indebtedness of any character whatever owing to the state, and, consequently, the court, carrying out this plain intent, will insert the comma in the place hereinbefore indicated.

Counsel for appellants also contend that since section 5004, which imposes the penalty sued for, provides that it shall be recovered by an action in the name of the state at the relation of the attorney-general or district attorney, that the grant of power to sue to these officials excludes any power to sue therefor in any other officials, and that, consequently, the revenue agent is without authority to bring this suit. This section, however, and section 4738, are parts of the same Code, were adopted at the same time, and must be construed together, and, so construed, the authority granted to the attorney-general and district attorney by section 5004 is not exclusive. To so hold would practically strip the revenue agent of all power, for in very few, if any, cases is he given the sole authority to collect or sue for money owing the state; such authority being generally also vested in other officials.

The decree of the court below, therefore, is affirmed, and the cause remanded for further proceedings.

Affirmed and remanded.

CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF MISSISSIPPI
AT THE
OCTOBER TERM, 1911.

JACKSON LOAN & TRUST Co. v. STATE EX REL. HUDSON,
ATTORNEY-GENERAL.

[56 South. 293.]

1. CORPORATIONS. *Forfeiture of franchises. Appointment of receiver.*

Where a loan company by means of attractively worded literature and by representations of its soliciting agents, seeks to induce the public generally, and prospective customers particularly, to believe that all purchasers of its contracts will receive loans from the company upon easy terms with which to purchase homes, and the funds of the corporation and its method of business, render it impossible for the company to make loans to all purchasers of its contracts, its promises so to do, evidences an intention to defraud, and its whole course of business constitutes such a systematic violation and abuse of the rights and privileges conferred upon it by its charter as to justify either the revocation of its charter or the issuance of a writ of injunction enjoining the further prosecution of such business.

2. APPOINTMENT OF RECEIVER. Right to appoint. Code 1906, Sec. 4029.

In the absence of a statute so providing, the chancery court in a proceeding to restrain a corporation from continuing in the business of selling and disposing of loan and investment contracts and asking for the appointment of a receiver, is without power to appoint a receiver or trustee to wind up the affairs of such corporation. Sec. 4029, Code 1906, only providing for the appointment of such trustee after judgment of forfeiture and ouster.

APPEAL from the chancery court of Hinds county.

HON. G. G. LYELL, Chancellor.

Suit by the state on the relation of S. S. Hudson, attorney-general, against the Jackson Loan & Trust Company. From a judgment enjoining defendant from further prosecuting its business and appointing a receiver, defendant appeals.

This was a suit filed by the attorney-general, in the name of the state of Mississippi, against the Jackson Loan & Trust Company, a corporation chartered under the laws of the state, in which it is sought to restrain this company from continuing in the business of selling and disposing of loan and investment contracts, and asking the appointment of a receiver to take over the assets of the company to be distributed among parties having claims against the company arising out of said contracts. The defendant answered, and then filed a motion asking the court to dissolve the temporary injunction previously issued. The state then filed a motion asking for the appointment of a receiver. By agreement the two motions were heard together before the chancellor, who took proof, and decreed that "the defendant, though not insolvent, violates the law and public policy of the state, as well as its charter franchises, orders, adjudges, and decrees that the motion of the defendant to dissolve the injunction be, and the same is hereby overruled, and the motion of the state for the appointment of a receiver be and the same is hereby sustained." From this decree an appeal was granted with *supersedeas*.

There were two questions presented on the hearing in the supreme court: (1) Was the chancellor justified in overruling the defendant's motion to dissolve the injunction? (2) Was the chancellor justified in sustaining the state's motion for the appointment of a receiver? The state's contention is that the business conducted by the defendant is a fraud. The defendant contends that the chancery court is without jurisdiction, and that this is a matter of contract between the parties, and should be privately adjusted between them.

The contract issued by the appellant is as follows:

"No.—. Series—. The Jackson Loan & Trust Company. Authorized Capital, one hundred thousand dollars. Investment Home Purchasing Contract. In consideration of the application for this contract and the advance payment of one dollar, and the payment of a monthly installment of one dollar to be made on the fifteenth day of each month from date hereof, the Jackson Loan & Trust Company issues this contract to—— or to his legal heirs, or assigns, upon the following conditions and terms and subject to the benefits, provisions, and requirements printed on the back hereof, which are hereby referred to and made a part of this contract as fully as if recited herein. Terms and Conditions. It is hereby agreed, that the monthly installments having been paid as herein provided, for three consecutive months, shall render this contract eligible for a loan, or funds to purchase a home in the sum of (\$100) one hundred dollars in the order of the holder's application therefor, the applicant being then entitled at his election, to advance the nine dollars required to make up the amount of twelve dollars provided for in paragraph No. 17, of said requirements as a condition to a loan. Eighty cents from each and every monthly installment received hereon, after the third installment, and all transfer fee, accrued interest, and return payments from all loans made from the loan funds, shall be placed in the loan

fund for the purchase of homes, or for making loans to the holders of contracts issued by the company. When this contract is entitled to a loan or for funds for the purchase of a home, the holder hereof of this contract shall obtain a complete abstract of the title to the property to be purchased, or on which a loan is desired, to be examined by the attorneys of the company, and if the title be approved and the property purchased or a loan made on same, the holder of this contract shall execute a deed of trust or mortgage, or a contract giving the company a lien on said property or land in such way or kind as the attorneys of the company may determine to be necessary. And the company shall pay, for the benefit of the holder of this contract, the said sum of one hundred dollars as aforesaid; and the holder of this contract shall pay to the company the sum of one dollar and twenty-five cents per month when a home is purchased, or a loan is made, on or before the fifteenth day of each calendar month, including interest at the rate of five per centum per annum. The said sum of one dollar and twenty-five cents per month including five per centum interest per annum, shall be placed to the credit of the holder of this contract, and shall be used to pay off the indebtedness of the holder of this contract to the company. When the monthly payments of one dollar and twenty-five cents shall aggregate the sum of one hundred dollars with interest and costs, less the amount the holder of this contract has paid this company, with interest on same at the rate of three per centum per annum after his third installment of monthly dues and before a home is purchased or a loan is made, then the lien of the company shall be discharged, and the title vested in the holder of this contract. It is further agreed that the remaining portion of the dues after the third monthly installment, except that portion set aside for the loan fund, shall be used for the expense of the company, or as may be deemed best by the board

of directors. Issued at the principal office of this company, at Jackson, Mississippi, the ——day of——, 19—. [Signed] ——, President. [Signed] ——, Secretary. [Seal.]

“Benefits, Provisions, and Requirements. . . . (5) If the holder of this contract shall have other contracts of this kind with the company, and his home shall cost more than one hundred dollars, and only a fractional part of the sum herein provided for shall be required to pay for said home, then such fractional part of one hundred dollars shall be furnished by the company, and the holder of this contract shall pay for such sum obtained on this contract the sum of one dollar and twenty-five cents on each one hundred dollars advanced, on or before the fifteenth day of each month subject to all other conditions contained in this contract. . . . (7) After (eighty) monthly installments of one dollar shall have been paid thereon, this contract shall be deemed matured and no further payments shall be required, and the company promises and agrees to pay to the holder hereof, or his legal heirs or assigns, the total amount of not over one hundred dollars, which shall be deemed the maturity value of this contract, provided all expenses and fines shall have been previously paid. Which amount shall be paid out of the funds of the company as soon as the amount on hand to the credit of this contract shall equal the maturity value hereof; or the holder may at such times accept in cash full settlement for this contract the amount in the funds of the company standing to the credit hereof. (8) Should the holder of this contract fail to pay an installment when due, before the holder has obtained the use or advancement of any money provided herein, a fine of ten (10) cents for each month of default shall be imposed until all over-due installments and fines shall have been paid; provided, however, if he shall fail to pay the said installments and fines for the term of (2) two consecutive

months after default, then this contract shall be wholly null and void and of no effect, and all payments paid thereon shall be forfeited and the aggregate amount of all payments thereon shall be retained by the company as agreed liquidated damages for the nonperformance of the contract by the holder; time, manner, and amount of payment being the essence of this contract. . . .”

McWillie & Thompson, J. C. Ward and R. N. & H. B. Miller, for appellant.

It is perfectly clear from the record that not a single person was ever fraudulently induced to contract with defendant and if any person can be said from the testimony to have contracted with appellant without understanding the contract, he did so because of his own negligence and want of attention, and not because of wrongdoing by the company.

No person, therefore, was defrauded, unless it shall be adjudged that the contract itself is so vicious and illegal as to amount in law to a fraud. We understand, and our understanding is supported by the terms of the decree of the court below, that the chancellor adjudged as a matter of law that the contract itself was of that character.

In our judgment the merits of this case lies in the contract itself, and nine-tenths of this ponderous record is wholly immaterial matter. There is nothing on the face of the contract, as distinguished from the “Benefits, Provisions and Requirements” printed on the back of it, worthy of mention. Certainly it does not evidence anything usurious, illegal or wrong in any way, and, in fact, the charge that the contract was and is usurious was so completely disproved that it was practically abandoned in the court below and the assailment of the contract was almost wholly, if not entirely, directed to the provisions printed on the back of it. That the contract

was a hard one, if that be true, did not warrant the injunction prohibiting its being made. But the contract upon its face is not a hard one, certainly it is not hard upon the borrower or purchaser who performs his obligations under it. If the contract be expressed in terms hard to understand, the circumstance cannot be invoked by the state to prevent persons who do understand it, or who think they understand it, from entering into it, any more than the state can intercept any other obscure contract. Obscurity is by no means the same as illegality. But, were the contract illegal, the parties to it are not without remedy in the courts and illegality does not of itself warrant the interposition of a court of equity. We have seen that there is nothing illegal on the face of the contract and we will now pass to a consideration of the provisions printed upon its back. It will be well at the outset to note that the customers of the company may be, and necessarily are, divided into three classes; first, those who purchase the contracts simply as an investment, without intent or effort to obtain a loan; second, those who purchase with intent of borrowing money, and who, having complied with their obligations to that end, actually obtain loans, thereby ceasing to be contract holders and become borrowers, pure and simple, and third, those who purchase contracts, fail to comply with their obligations and consequently are denied loans, with possibly a fourth class, those who purchase contracts in order to obtain a loan, who comply with their obligations and are entitled to but are denied a loan for the full sum sought or delayed in obtaining it. Some of the provisions printed on the back of the contract relate to these separate classes of customers.

Much stress was placed in the court below by appellee's counsel upon a claim that the controversies touching loans which have arisen between defendant and the number of persons who have testified complainingly of

their individual grievances practically demonstrate that the contract itself is vicious. In respect to this we have to say that the construction of the contract is for the courts and not for the witnesses; that not one of them have ever judicially established that he had been wronged by defendant; that the courts have been and are open to them, and the defendant has the right to defend each and every cause brought against it in a separate action, without being embarrassed by having to answer a multitude of suits all in one cause and all merely collaterally involved therein. That these grievances are all personal to the complaining witnesses and do not invest the state with a cause of action, and no number of such business controversies, singly or all combined, authorize the state to enjoin the carrying on by defendant of a business which is not unlawful.

Coming now to the authorities. The case in the books nearest in application to the case at bar is the case of *Equitable Loan & Trust Co. v. Waring* (Ga.), 62 L. R. A. 108.

There are many differences between that case and this one which are to our advantage as these differences tended to render the contract and scheme there passed upon illegal and their probative force is wanting here. There the aggrieved parties were complainants, suing for themselves and all others in like position; here the state is the complainant; there the postoffice department (as shown by the opinion of the trial judge approved in the dissenting opinion) of the United States government had at one time excluded the company from doing business through the mails on the ground that its business was a lottery; here the bill avers the same thing; the averment was denied and was disproved, and the appellant company was permitted to and did use the mails at liberty. Even this decision by the trial judge, approved in the dissenting opinion, affirms that if the scheme of the company were legal and its contracts valid,

deceptions practiced on certificate holders, if proved, would not require the appointment of a receiver. There the company was not adjudged to be solvent; here the company's solvency is adjudged and determined.

In that case the applications were numbered as they were received at the office of the company, but, unlike this case, each application did not entitle the applicant, after performing the obligations necessary thereto, to a loan in their order, but the same was determined, according to the trial judge's finding of fact, by some sort of a scheme of chance, a table of numbers called "numerals" which he decided to be a lottery. In this case there was no such scheme; each was to receive a loan in the order of his application; one of the tests of a lottery as shown by the trial judge's opinion in the Georgia case is that thereby "one gets more than another similarly situated;" here that is not the case. The applications were acted upon and honored, if entitled to be honored, in the order in which they were received by the company "first come, first serve" is the rule, and one first coming is not similarly situated with one coming after him. All customers of defendant company were and are given equal (and not unequal) advantages. In the Georgia case (as found by the trial judge) the defendant's business was to issue a large number of certificates or promises to pay, and their payment depended absolutely upon the chances of many lapses or forfeitures. In this case the company's scheme did not depend upon lapses or forfeitures. We append to this brief a statement from which it distinctly appears that if there were not a single lapse or forfeiture the company could meet each of its obligations and yet make money for its stockholders. The trial judge in the Georgia case, 62 L. R. A. 108, formulates the grounds upon which he ruled the contract there presented to be unlawful, viz., the use of chance, prizes, thus amounting in his opinion to a lottery, and the fact that the whole

scheme depended on lapse or forfeitures. Here we have no element of chance, no prize and no dependence on lapses, or forfeitures.

We have called attention to these distinctions between the Georgia case and the one at bar for two-fold purposes, first, to show that our case is not within the reasoning of the trial judge's opinion, approved in the dissenting opinion, in that one, and, second, to show that the controlling opinion by Cobb, J., delivered in that case, and concurred in by a majority of the court, is *a fortiori* the more applicable to the question before this court.

The first paragraph of the opinion of the supreme court of Georgia (62 L. R. A. 113) shows that the trial court had adjudged the scheme there under review to be, first, a lottery, or in the nature of a lottery, and therefore illegal and, second, that it was impossible of performance by legal methods. We have no such case before this court. The majority opinion in the Georgia case shows (although that contract was much stronger against the company than the one here involved) that the contract there under consideration was not a lottery nor in the nature of a lottery and that it was not incapable of performance. The argument of the Georgia supreme court is so very able and full that it relieves us of labor, and this court is earnestly asked to carefully read it, weigh its arguments and apply it to the case. We make it a part of this brief.

Counsel in the court below counted much on the case of *State v. New Orleans Debenture, etc. Co.* (La.), 26 South. 586; but that case is so different from the present one as to be readily distinguished. The debenture company was not a loan company at all; its customers were all investors pure and simple, and the scheme absolutely depended on lapses and forfeitures. The court said "All calculations—show that loss is inevitable, unless 'lapses and forfeitures' are to be considered as fac-

tors of revenue to an extent to which the defendant itself does not contend." The company had not been mismanaged, or to use the language of the supreme court of Louisiana, "We think the management was good enough. None the less it has fallen behind—all, we believe, because the plan is not feasible." And the court said in another place in the opinion, "Its assets are much less than its liabilities." It was, therefore, insolvent. Appellant company is solvent, adjudged by the court below to be solvent. It has done and was doing when enjoined a prosperous business. Its plan is feasible.

While the Louisiana case may be authority for a suit by the state to enjoin a business under an invalid charter from carrying on a business contrary to the public policy it has no application in this case where defendant was operating under a valid charter and where its business was not dependent upon lapses and forfeitures.

Appellee's counsel also counted upon *State v. Nebraska Home Co.* (Neb.), 60 L. R. A. 448. This case was one in which there were no mere investors, but all customers sought to become borrowers. The Nebraska court seems to have misapplied the decision of Judge Woods in *McDonald v. United States*, 63 Fed. 426, touching the numbering of applications. It will be seen in the case decided by Judge Woods that the bonds were not payable in their numerical order at all, but their order was determined by a chance device. Judge Woods said, "There are four numerals to every multiple, and it follows that a bond (which might as well be called a ticket) bearing a high multiple number will be entitled to payment sooner than three-fourths of the bonds bearing lower numbers among the numerals and the further the process is carried, the greater becomes the disparity between the multiple and the numerals next to be paid, and correspondingly the bonds numbered with numerals, except as benefited by lapses, become less and less valuable, because the day

of possible payment becomes more and more remote.” Their number one was first payable, number five next, number two next, number ten next, and so on, alternating between numerals so called and multiples of five, except that between every fourth and fifth of the multiples no numerals intervene. Of course, under such a scheme the element of “chance” was patent. The Nebraska case ignores the entire point to Judge Wood’s decision and seems to find an element of chance where none existed in the order in which the application was received by the company, and the trial judge in the Georgia case fell into the same palpable error.

The Nebraska case, to further note it, was one in which by the operation of its scheme the borrowers were postponed for an unreasonable length of time and the contract was impossible to perform in this world, and it did not undertake to furnish its customers a home in the next one. That case is not authority against us, since appellant’s contracts are capable of performance on this earth and there can be no pretense of such unreasonable delay, seventy years, as appeared in the Nebraska case.

Of course, “first come, first serve” is an equitable rule and a lawful one. It no more depends upon chance” than many other important legal affairs of life. To adjudge the making of loans in the order of applications for them a “lottery” would extend lotteries beyond all reason and make nearly everything in life a “lottery.”

The Ohio case, *State ex rel., etc. v. Interstate Saving & Investment Co.*, 52 L. R. A. 530, cited by appellee in the court below is so different from the case at bar as to distinguish itself. It is a case where the business was dependent wholly on lapses and forfeitures and it contained in the judgment of the court a lottery scheme for which it was condemned.

The case cited in the court below by appellee’s counsel, *Enterprise Savings Association v. Zumstein*, 64 Fed.

837, simply decides that the courts will not review the discretion and judgment of the postmaster-general in discontinuing the use of the mails by a party, because in his judgment the business of the party constituted a lottery. This and nothing more. Of course, the decision is not authority in the present case.

Cassedy & Butler, for appellee.

No brief for appellee found in the record.

Argued orally by *R. H. Thompson*, for appellant.

Argued orally by *Geo. Butler*, for appellee.

SMITH, J., delivered the opinion of the court.

Appellant, a loan company, by means of attractively worded literature and by representations made by its soliciting agents, seeks to induce the public generally, and prospective customers particularly, to believe that all purchasers of what it styles its "investment, home purchasing contract" will receive loans from the company upon easy terms with which to purchase homes. (The reporter in reporting this case is directed to set out this contract, together with sections 5, 7, and 8 of the "Benefits, Provisions, and Requirements" printed on the back thereof.) While this contract ostensibly has an investment feature of a vague and indefinite character, contained in section 7 of the "Provisions, Benefits, and Requirements," the loan feature thereof is the principal inducement held out to the public and because of which these contracts are purchased. The funds out of which loans are to be made, and from which only the company is required to make them, consists of eighty per cent. of the monthly payments made by the purchasers of contracts, excluding the first three payments, plus transfer fees, interest, and return payments on loans. The first dollar which the purchaser pays goes to the company's agent, who solicits the contract, as his

commission. The next three monthly payments of one dollar each and twenty per cent. of all payments made thereafter go to the company and become its property absolutely. When a loan is made to the purchaser of a contract, he ceases to make any further payments thereon, and thereafter his payments are in return of the money borrowed, with interest. The addition by the borrowers to the loan fund consists of only the interest on the money borrowed. It is utterly impossible, therefore, for the company to comply with its promise to make loans to all purchasers of its contracts. The language in which the opinion in the case of *Fidelity Funding Company v. Vaughn*, 18 Okl. 13, 90 Pac. 34, 10 L. R. A. (N. S.) 1123, is couched, is strikingly applicable here, although the case itself can be distinguished from the case at bar. Changing this language slightly the ability of appellant to make loans depends almost entirely upon the number of contracts sold; the monthly payments made on the new contracts being used to make loans to holders of earlier contracts. The sale of new contracts must constantly increase at a high progressive rate in order that such loans may be made, and, it being impossible to continue this indefinitely, the end must come sooner or later, and, when it does come, the more successful the business up to that time, the greater the number of contracts to make loans which the company will be unable to fulfill. In the language of *Public Clearing House v. Coyne* (C. C.), 121 Fed. 929, it is a literal demonstration of the old saying, "The devil takes the hindmost." Since appellant's organization in 1906 up to October, 1910, eleven thousand, one hundred and sixty persons have applied to it for ninety-six thousand, six hundred and thirty-two contracts. Most of these applications have fallen by the wayside, there being now outstanding eight thousand contracts, owned by one thousand, two hundred and thirty-three persons. The number of loans made by the company in this time is

one hundred and seventy, and of the one thousand, two hundred and thirty-three owners of contracts, three hundred and eight only are eligible. Truly, "Many are called, but few are chosen."

It being impossible for the company to make loans to all purchasers of its contracts, its promise so to do evidences an intention to defraud, and consequently the whole course of its business constitutes such a systematic violation and abuse of the rights and privileges conferred upon it by its charter as to justify either the revocation of its charter, or the issuance of a writ of injunction, enjoining the further prosecution of such business. The court therefore committed no error in granting the injunction.

The court did err, however, in appointing a receiver; for, unless there is a statute so providing, the court, in proceedings of this character, is without power to appoint a receiver or trustee to wind up the affairs of a corporation. 5 Thompson on Corporations, Sec. 6353; 2 Clark & Marshall on Private Corporation, Sec. 334, subd. "h;" 3 Cook on Corporations (6 Ed.), Sec. 863. Section 4029 of the Code of 1906 provides for the appointment of such a trustee, but only after judgment of forfeiture and ouster.

Reversed and remanded.

ANDERSON, J. (dissenting).

I shall very briefly set down the grounds of my dissent. The state has no more to do with the affairs of a corporation chartered by it, except to forfeit its charter when violated, than it has to do with the private affairs of any individual within its borders. The state's only concern is to see that such a corporation does not violate, misuse, or abuse its charter. It will not forfeit the charter of a corporation because it is engaged in a dishonest business, provided, of course, in the prosecution of such business its charter is not violated. The

state will not undertake such a fatherly care over the affairs of the people as that it will prevent a corporation from entering into contracts with them which are improvident and unreasonable. The state is not called upon to litigate strictly for the vindication of private interests. The courts are open to all who have grievances against corporations. There they can obtain redress without calling on the state to espouse their cause.

The business and assets of a corporation belonging to its stockholders, which is not to be destroyed and rendered worthless at the instance of the state, except on the clearest and most convincing evidence that its charter is being violated. Here we have a corporation, prosperous and amply solvent. It has assets subject to the process of the courts. Any investor who is aggrieved has his remedy, and there is property to satisfy any judgment he may recover.

In the majority opinion it is held that the whole course of the business of this company is fraudulent, and constitutes an abuse of its charter. In my judgment the contract (investor's contract) is perfectly valid; that it is an absolute promise to pay each investor at the end of eighty months one hundred dollars for every eighty dollars paid in by him. Construing the contract most strongly against the company, as must be done under the law, it can have no other meaning. But even though that be not the proper construction, and conceding that the contract means a promise to pay the investor only his *pro rata* share of the earnings of the loan fund, still I do not see that that would render it invalid. Such a contract may be unreasonable, but that does not signify that it is illegal. Investors buy these contracts with their eyes open. They are notified by the company not to pay any attention to what the agents say, but to read the contract. It is argued on behalf of appellee that the scheme of the company will not "finance out," and a majority opinion holds that new contracts must con-

stantly increase at a high progressive rate in order that loans may be made, and this cannot be continued indefinitely, and therefore the end must come sooner or later. It seems to me a complete answer to this is that the record in this case shows that the scheme has already "financed out." After about three years of experience the company has demonstrated its ability to meet all obligations. In my opinion not a single authority relied on by counsel for appellee sustains their contention. The contracts and the character of business under consideration in those cases were so widely different from the case here as to render those authorities without point. On the other hand, though the facts in the case of *Equitable Loan & Security Company v. Waring*, 117 Ga. 599, 44 S. E. 320, 62 L. R. A. 93, 97 'Am. St. Rep. 177, are materially different in some respects from the facts of this case, the reasoning of the court is able and convincing and decisive of the question here.

I am unable to see that the whole course of the business of this company is fraudulent. It may be that its contracts are unreasonable and unjust, and the people ought not to patronize it, but, if that is all, I do not see that it is any of the state's concern.

H. W. CRENSHAW ET AL. v. STATE OF MISSISSIPPI EX REL.

[58 South. 219.]

CONSTITUTION 1890, SEC. 90, PAR. Q. *Special Laws. Drainage. Natural Water Courses. Ch. 147, Acts of 1908.*

Acts of 1908, Ch. 147, is a special and local law creating a special drainage district, with the object and purpose to provide adequate and effectual drainage by artificial drains or "other drainage facilities" and for shortening and improving the "natural channels and water ways" in said district, and is therefore violative of Constitution of 1890, Par. Q, prohibiting the legislature from making special laws relating to water courses, fences and stock.

APPEAL from the circuit court of Tunica county.

HON. SAM C. COOK, Judge.

This was a *quo warranto* proceeding by the state of Mississippi on the relation of W. A. Alcorn, Jr., district attorney, against H. C. Crenshaw and others. From a judgment granting the writ, defendants appeal.

The facts are sufficiently stated in the opinion of the court.

Dinkins & Caldwell and *J. W. Cutrer*, for appellants.

Julian C. Wilson and *Oscar G. Johnson*, for appellee.

No brief of counsel on either side found in the record.

Argued orally by *J. W. Cutrer*, for appellant.

Argued orally by *O. G. Johnson* and *Julian C. Wilson*, for appellees.

McLEAN, J., delivered the opinion of the court.

This is a writ of *quo warranto*, brought by the district attorney against the officers of what is known as the "Tallahatchie Drainage District." It is necessary

to consider only one of the very many interesting questions which this record presents, as this one question is decisive of the case.

In 1908 the legislature of this state passed what is known as the act creating the Tallahatchie drainage district in this state. Ch. 147, p. 147, Acts 1908. The object and purpose of this suit is to test the constitutionality of that act. The act by its express provisions applies to the county of Quitman, and certain parts of the counties of De Soto, Tate, Tallahatchie, Tunica, and Coahoma, and by no sort or kind of reasoning can this act be rescued from being a local act. Sec. 90 of the Constitution of 1890 provides that: "The legislature shall not pass local, private or special laws, in any of the following enumerated cases, but such matters shall be provided for only by general laws, viz.: . . . (q) Relating to stock laws, watercourses and fences." Section 2 of the act provides that: "Be it further enacted that the object and purpose of creating said drainage district is to provide adequate and effectual drainage for the lands thereof, by artificial drains, canals, ditches, or other drainage facilities." Section 6 provides that said commission shall cause its chief engineer to inaugurate and complete a system of surveys to cover the entire territory of said drainage district. Said surveys shall be made so as to develop the topography of the land "and its facilities and possibilities for drainage, and the best method to effect the drainage of said entire drainage district and all of its parts, by artificial canals and by ditches, and by shortening and improving the natural channels and waterways in said district." Section 7 provides that said chief engineer "shall also develop by said surveys the natural drainage units in said drainage district, . . . and shall make a map of each of said drainage units, showing thereon the system of lateral drains, ditches, or improved natural water channels," etc.

It is therefore perfectly manifest from this act that "improved natural water channels" and "the natural channels and waterways" and "other drainage facilities"—that is, "other than artificial drains, channels, ditches"—are to be dealt with by this commission. After a very careful examination of this act, we are driven to the conclusion that, so far as the proposition now under consideration is concerned, there is practically no difference between this act and the act of the legislature (Ch. 183, Laws of 1910) creating what is known as the "Belzoni Drainage Commission." This latter act received a most careful consideration by this court, and it was held in *Belzoni Drainage Commission v. Winn*, 98 Miss. 359, 53 South. 778, that the Belzoni commission was violative of paragraph "q," Sec. 90, of the Constitution of 1890. We do not know of anything that can be said to what has already been said by this court in *Belzoni Drainage Commission v. Winn*, *supra*, except to emphasize this proposition: In *Ferris v. Wellborn*, 64 Miss. 29, 8 South. 165, in defining a watercourse, this court said: "The proof is that Prairie creek is a natural channel, one-half or three-quarters of a mile long, with defined bed and banks of varying width, through which water is conveyed and discharged into the lowlands adjacent to Plum creek. It is undoubtedly a watercourse whenever there is water to run into it, and the fact that it is most of the time dry and not running is not enough to deprive it of the character of a watercourse, with its incidents, among which is the right of the riparian owner to have it as nature made it as a drain for the adjacent land." This decision was rendered at the October term, 1886, of this court, and within less than four years thereafter, the constitutional convention of 1890 convened, and inserted in that instrument the provision hereinbefore referred to. It is to be presumed, and conclusively presumed, that the constitutional builders that builded that instrument did so with

a full knowledge of what is meant by "watercourses" in this state; and, however this much vexed question may be decided in other jurisdictions, we are constrained to the conclusion that the term "watercourses," as named in the Constitution, covers the definition given in *Ferris v. Wellborn, supra*.

Upon the authority of *Belonzi Drainage Commission v. Winn*. 98 Miss. 359, 53 South. 778, the case is affirmed. *Affirmed.*

EASTMAN, GARDINER & CO. v. WIRT ADAMS, STATE REVENUE AGENT.

[58 South. 221.]

BOARD OF SUPERVISORS. *Claims for cutting timber. Sixteenth sections. Authority to settle Code 1906, Sec. 4701. Constitution 1890, Sec. 100.*

Under Code of 1906, Sec. 4701, giving boards of supervisors jurisdiction and control of sixteenth sections situated in their counties, etc., such boards have the right to compromise and settle unliquidated claims for damages for the wrongful cutting of trees on such land, and this section of the Code is not violative of Constitution of 1890, Sec. 100, providing that no liability to the state shall be remitted or in any way extinguished, except on payment of its face value, but that the legislature may provide by general law for the compromise of doubtful claims.

APPEAL from the chancery court of Jones county.

HON. SAM WHITMAN, JR., Chancellor.

Suit by Wirt Adams, state revenue agent against Eastman, Gardiner & Company. Judgment for plaintiff, and defendant appeals.

The facts are fully stated in the opinion of the court.

Shannon & Street, for appellant.

At the October term, 1902, the board of supervisors fixed the value of the timber cut by appellant at six hundred dollars. Appellant paid that sum and it was accepted by the board in full settlement and satisfaction of all demands against appellant. This was done by proper order entered on its minutes. It is presumed that the board of supervisors knew something of the value of the timber cut and its finding that the value was six hundred dollars is conclusive.

But it is said that the board of supervisors had no authority to settle the case—its own case; that it was a compromise settlement and that the amount accepted was inadequate. Well, where is the proof that the amount accepted by the board of supervisors is or was inadequate? The order of the board is entitled to full faith and credence and when it fixed the value at six hundred dollars, that is the value in the absence of fraud. There is not only a lack of testimony in the record that this was inadequate, but the appellee expressly states that, so far as he personally knows, this was a fair value. At any rate, there is nothing in the record to show that it was not a fair value.

The complainant does not offer to return the six hundred dollars with interest, nor does he offer to credit appellant with it in any way.

We submit that, under the laws of this state, the board of supervisors and not the appellee, has full jurisdiction of sixteenth sections, and the board—and not appellee—has the right to fix the value of the timber.

Aside from any law on the proposition, we submit as an abstract proposition, without fear of successful contradiction, that any board or person or corporation having authority to bring a suit, has authority to compromise and settle it.

By Sec. 4150, Code 1892 (Code 1906, Sec. 4701) the boards of supervisors of the several counties are given

full control of sixteenth sections. And, by the Laws of 1898, Ch. 41, the board of supervisors is given authority to sell sixteenth section timber. And this act was upheld and declared constitutional in the case of *L. N. Dantzler Lumber Co. v. State*, 53 South. 1; *Smith County v. Eastman Gardiner & Co.*, 53 South. 7; and *Beasley v. McElhaney et al.*, 53 South. 8. It is held in the *Dantzler case, supra*, that “inadequacy of price does not vitiate a sale of timber on school lands in the absence of fraud; the determination of the price being discretionary with the county supervisors, whose decision will not be disturbed, in the absence of fraud or collusion.” There is nothing in the law, Ch. 41, Laws 1898, Code 1906, Sec. 4702, which says that the board only has authority to sell the timber before it has been cut and not after it has been cut. So we contend, that the supervisors have authority to sell the timber, whether it is standing on the land or already cut. And, in selling the timber, they—and they alone—have the power and authority to fix its value and when they do fix it, their determination is final and binding, in the absence of fraud or collusion.

Sec. 100 of the Constitution has nothing in the world to do with a case like this. It is not a question of compromising a fixed and definite amount due the county, but is a case of the board having authority in the premises fixing the amount due and allowing it to be paid. After the board had fixed the amount due at six hundred dollars, it probably would have had no authority to accept a less sum. But it did not compromise the claim at all. The value of the timber cut was six hundred dollars, because the board said, by proper order, that six hundred dollars was the value. The board did not compromise this, but collected it in full as shown by the order attached to the pleadings and depositions. Sec. 100 of the Constitution says that the legislature may not do certain things, but it has absolutely no reference to a

case of this kind where full value is fixed, paid, and accepted. Appellee is welcome to all the consolation he may be able to get out of Sec. 100 as applied to the facts in this case. For a thorough discussion of Sec. 100 of the Constitution, see *Adams v. Fragiaco*, 71 Miss. 417, which sustains our contention.

Henry Hilbun, for appellee.

We submit that the compromise entered into by Eastman, Gardiner & Company, and the board of supervisors of Jones county, is plainly and manifestly in direct violation of Sec. 100 of the Constitution of this state; and therefore void and of no effect, and the court below did not err in so deciding.

Sec. 100 of the Constitution of 1890 is as follows: "No obligation or liability of any person, association, or corporation, held or owned by this state, or levee board, or any county, city, or town thereof, shall ever be remitted, released or postponed, or in any way diminished by the legislature, nor shall such liability or obligation be extinguished except by payment thereof into the proper treasury; nor shall such liability or obligation be exchanged or transferred except upon payment of its face value; but this shall not be construed to prevent the legislature from providing by general law for the compromise of doubtful claims."

It appears that appellant, Eastman, Gardiner & Company, entered upon the sixteenth section described in the bill in this cause, and cut and removed, for purely commercial purposes, the timber on said section, without authority of law; that after the said timber had been cut and removed, and after suit had been filed against them by the county for unlawful cutting and removal of said timber, and while said suit was pending, and before there had been any adjudication by the courts on the merits, there was a compromise settlement made by the board of supervisors of Jones county and the said Eastman,

Gardiner & Company, whereby the board of supervisors, in consideration of the payment of three hundred dollars, attempted by an order to release Eastman, Gardiner & Company from all liability for this obligation. The order made by the board which is set forth in the record in this cause, shows on its face that this settlement was a compromise, and not the full payment of the obligation.

No testimony is needed to establish this fact.

In the case of *Morris Ice Company v. Wirt Adams, Revenue Agent*, 75 Miss. 410, this section of our Constitution was construed. It seems that on February 3, 1882, the municipal authorities of the city of Jackson, attempted by ordinance to release and abate certain claims for taxes due and owing by the Morris Ice Company to said municipality. The revenue agent, ignoring this offer on the part of the municipal authorities to release this obligation, instituted a suit for the recovery of said sum. Our court in deciding this case, and in construing Sec. 100 of the Constitution, said:

“The best that can be said for appellant, is, that the municipal authorities, after all taxes now sought to be collected were due, and most of these long overdue, endeavored to make a present of them all to the delinquent. Clearly this was beyond the power of the municipal authority. These taxes were a liability, and the power to remit or release them was beyond the reach of the municipality.”

This court again construed this section of the Constitution, in the case of *Jackson Electric Railroad, Light & Power Co. v. Wirt Adams, State Revenue Agent*, 79 Miss. 408. It seems in this case that the municipal authorities of the city of Jackson attempted to refund the sum of fifteen hundred dollars, being the money of the city, to Carnes & Corson, contractors. The revenue agent brought suit for the recovery of this amount, and the court held that a municipality is powerless, under

the Constitution of 1890, Sec. 100, to refund money of the city, which was forfeited to the city by a breach of contract in respect to public work.

Counsel for appellant, in their brief, insist that this section of the Constitution does not apply to this class of obligations, and that the board of supervisors had authority to compromise this obligation. While it is true that a case identical with this case has never been passed upon by our supreme court, yet, in the case of *State v. Fragiacom*, 71 Miss. 418, the court in construing this section of our Constitution, on page 423, said:

“It was against the power to compromise claims of this character that the prohibition was principally aimed, but its language was so chosen as to include cases of pecuniary obligations of other classes.”

The legislature of this state, acting under the authorities conferred by Sec. 100 of the Constitution, has passed laws defining doubtful claims, the only kind we submit that can be compromised, and providing the manner in which the compromise can be made. Sec. 1680, Code of 1906, is as follows:

“A doubtful claim of the state, or of a county, city, town, village, or levee board, is one for which judgment has been rendered, and for the collection of which the ordinary process of law has been ineffectual.”

The claim in this case was against Eastman, Gardiner & Company, an abundantly solvent corporation. Suit had been filed for the collection of the obligation; but it was compromised before any judgment on the merits had been rendered, and before an attempt was made to collect by ordinary process of law.

Sec. 1681, of the Code of 1906, provides the manner this compromise, if a doubtful claim as defined above, can be made.

“The governor on the advice of the attorney-general or state revenue agent, may upon application of the defendant proposing a compromise, settle and compromise

any doubtful claim of the state, or of any county, city, town, village or of any levee board, against such defendants, upon such terms as he may deem proper, the board of supervisors in case of a county, and the municipal authorities in the case of a city, town, or village, and the levee board, in the case a claim of a levee board, concurring therein."

This claim against Eastman, Gardiner & Company was not a doubtful claim. It was against an abundantly solvent corporation.

The constitutional convention, in ordaining this section of our Constitution, undoubtedly intended to put it beyond the power of the legislature of the state, and all other authorities of the state, or the subdivision thereof, to release or compromise obligations of this character; that it must have been their intention in ordaining this section, to see to it that persons or corporations owing the state, or any of the legal subdivisions thereof, should pay the full amount of their obligation into the proper treasury. We have not found in the law defining the powers and duties of the board of supervisors, any authority whatever conferred on this board to compromise claims of this character. This was a claim for unliquidated damages. The amount should have first been ascertained in a court of competent jurisdiction, after hearing the evidence as to the value of the timber cut and removed from this section. After the amount had been ascertained in this court, then Eastman, Gardiner & Company, under the law, should have been required to pay the full amount of this obligation into the proper treasury. This was no doubtful claim. The board of supervisors had no authority to compromise with a solvent corporation, a liability which could have been established without question, in any court of competent jurisdiction.

It was manifestly the intention of the makers of our Constitution that public obligations should be paid in

full into the proper treasury, just as other obligations are paid.

The board of supervisors is purely a creature of statute; its powers and authority are defined by the statute. It is utterly powerless to exceed this authority granted in express terms. In justification of its every act, the board must be able to point to a statute conferring authority to act. It has no common law existence; no inference and presumption can be indulged in to its favor; it is a creature of the lawmaking body of the state. It cannot possibly have any greater powers than the legislature—the fountain cannot rise higher than its source.

Sec. 100 of the Constitution clearly says that, “No obligation or liability of any person, association, or corporation, held or owned by the state, or levee board, or any county, city or town, thereof, shall ever be remitted, released or postponed, or in any way diminished by the legislature.” If the legislature of the state, the body creating the board of supervisors and defining its powers, cannot diminish a public obligation, then how can the board, being the creature of the legislature exercise any such power?

The case of *Dantzler Lumber Co. v. State*, 53 South. 1, relied upon by counsel for appellant as conclusive of this case, is not at all in point. That was a case where timber on sixteenth sections was sold by the board of supervisors by virtue of the plain statute, Sec. 4701, Code of 1906. This is not the case now before the court. Let counsel for appellant cite this court a statute granting in express term the board of supervisors the right to compromise an obligation against a solvent concern, the amount of which could have been established beyond question, in any court of competent jurisdiction.

No argument however plausible, and no logic however powerful, can ever blend and unite the questions at issue in the *Dantzler case* and this case.

Argued orally by *C. S. Street*, for appellant.

Argued orally by *Chalmers Alexander*, for appellee.

SMITH, J., delivered the opinion of the court.

Appellee instituted this suit in the court below to recover of appellant damages, on behalf of the state, alleged to have been sustained by reason of the cutting by appellant of timber on sixteenth section land. From a decree in his favor, this appeal is taken.

We will pass by all preliminary matters, and address ourselves solely to what appears to be the merits of this controversy. Some time prior to the institution of this suit, appellant had cut timber from sixteenth section land, and the board of supervisors of Jones county, in which county the land was situated, instituted a suit in the chancery court of that county to recover the value thereof. On application of the defendant, this suit was removed to the federal court at Meridian. While the suit was pending the board of supervisors fixed the value of the timber cut at three hundred dollars and accepted from appellant this sum in full settlement thereof, and an agreed decree reciting this settlement was entered in the federal court. The contention of appellee is that the timber, in fact, was worth more than three hundred dollars, that under the provisions of Sec. 100 of our state Constitution, the board of supervisors was without power to accept any sum less than the real value of the timber in settlement therefor, and that, consequently, the action of the board was a nullity, and did not operate as a discharge of appellee from liability for the actual value of the timber.

Under Sec. 4701 of the Code of 1906, the boards of supervisors of the several counties in which are situated sixteenth section lands have, under the general supervision of the land commissioner, jurisdiction and control thereof, and of all funds arising from any disposition thereof. When this timber was cut by appellant, it

therefore became the duty of the board of supervisors of Jones county to collect from it the value thereof, and to institute whatever proceedings necessary to enable it so to do. The claim of the county or state against appellant was unliquidated, and, in order that a settlement could be had, authority to ascertain and fix the amount thereof must of necessity be lodged somewhere; and since the board of supervisors had full jurisdiction and control of the matter, it follows that this power is lodged with it. Otherwise, no settlement of such a claim could ever be made, except at the end of a lawsuit, in which the amount of damages could not be agreed upon, but must be ascertained by the judgment of the court. It cannot be, therefore, that this character of obligation or liability is embraced within the meaning of these words, as used in Sec. 100 of our Constitution.

In *State v. Fragiacom*, 71 Miss. 425, 15 South. 798, this court, in responding to the contention of counsel that these words embraced liabilities of every character to the state and its subdivisions, used this very apt and pertinent language: "Aside from the restriction on legislative action, the section operated equally upon the levee board and upon the counties and towns of the state, and, if construed according to the contention of counsel, would disable not only the state, but all its subdivisions, from making any concession or agreement in reference to very many subjects as to which it may be of the very highest importance that the power should exist. As a litigant, the state or any of the corporations named would be precluded from conducting its suits with that freedom of action which is often found to be invaluable in the progress of litigation. No agreement of counsel, however honestly made, no concession, no compromise, the effect of which would be to 'diminish' or 'postpone' the demand asserted, would be conclusive, and therefore never would be accepted. From a consequence such as this the mind shrinks and retreats. A

change so radical and serious can only be believed to have been contemplated when the language used is clear and unambiguous, and sufficient to impel to but one conclusion.”

Since it does not appear that this settlement was tainted with fraud or collusion, it must be held to be valid, and, consequently, the decree of the court below is reversed, and the bill dismissed.

Reversed and dismissed.

T. C. WRIGHT ET AL. v. EDWARDS HOTEL & CITY R. R. Co.

[58 South. 332.]

1. OPERATION OF STREET RAILROAD. *Mandamus. Judgment. Collateral attack.*

Where a street railroad, operating its road along a public highway under a franchise from the board of supervisors, ceased to operate a portion of the same and the board of supervisors declared the abandoned tracks a nuisance and ordered their removal from the highway, which was accordingly done, mandamus will not lie to compel the company to operate its cars on the abandoned tracks, though the action of the board was unwise or induced by fraud.

2. SAME.

Such order of the board of supervisors for the removal of the abandoned tracks cannot be attacked collaterally in a mandamus proceeding.

APPEAL from the circuit court of Hinds county.

HON. W. A. HENRY, Judge.

Petition by T. C. Wright et al. for a writ of mandamus against the Edwards Hotel and City Railroad Company. From a judgment dismissing the petition the petitioners appeal.

The facts are fully stated in the opinion of the court.

A. H. Longino & Jas. R. McDowell, for appellants.

By reference to Vol. 36, Cyc., page 1398, it will be seen that mandamus is the proper remedy to enforce whatever rights abutting property owners have against a street railway which seeks to abandon a part of the line constructed and operated by virtue of a contract with the municipality. I shall also quote a few cases which will dispel any doubt on this point.

"A street railway company which has accepted the grant of a public franchise, involving the performance of certain services, can be compelled by mandamus to perform such service." *Oklahoma City v. Railroad Co.*, 93 Pac. (Okla.) 48.

"Mandamus is the proper remedy to compel such street railway company to perform the duty of maintaining and operating such railway for the benefit of the public. The public duty imposed upon the company is always active, and imperative, and must be executed until lawfully surrendered, suspended or abandoned by the legally expressed consent of the state; and the performance of this duty can be lawfully enforced by mandamus." *State ex rel. v. Traction Company*, 45 L. R. A. (N. J.) 837.

"Mandamus is the proper remedy to compel a street railway company to perform its duty of maintaining and operating its road for the benefit of the public. *State ex rel. v. Traction Co.*, 62 N. J. L. (N. J. Sup.), 592, 43 Atl. 715, 2 L. R. A. Digest, 2009.

"The operation of a street railway can be enforced by mandamus where a company which has acquired the right and commenced to perform the service attempts to discontinue it." *State ex rel. v. Street Railway Co.*, 19 Wash. 518, 53 Pac. 719; *State ex rel. v. A. C. L. R. Co.*, 53 Fla. 650; *So. Ex. Co. v. Rose*, 124 Ga. 581, 53 S. E. 185; *Robbins v. Bangor R. & E. Co.*, 100 Me. 496; *People v. Railroad Co.*, 35 L. R. A. 656; *State v. Transfer Co.*, 83 N. W. 32; *I. C. R. R. Co. v. People*, 143 Ill. 434, 33 N.

E. 173; *Loraine v. Railroad*, 205, Pa. 132, 54 Atl. 580; *State v. Railroad Co.*, 57 N. W. 970; *Loader v. Heights*, 35 N. Y. Sup. 996. See also L. R. A. Digest 2, pages 2008, 2009.

The next point which I desire to discuss is, the right of abutting property owners and residents of an abandoned portion of track to invoke this relief. Of course they have the right to this relief, if they are entitled to the service. Our contention is that having once accepted and enjoyed by virtue of this franchise the use of the Clinton road, and having once constructed and operated a line along this road to the Livingston Park entrance; the appellee was without authority to abandon any portion of the line which it had ever constructed and operated. The court will see that the railroad company is given the right to use the road. It is not compelled to do so, but when it once accepts the franchise and when it once enters upon the user of the street, and when it once constructs and maintains a line of railway along this road, the persons who live on its line and buy and improve property because of the car service have a vested right to that service.

In support of this line of argument, I cite the court to the case of *State ex rel. v. Street Railway Co.*, reported in 41 L. R. A. (O. S.) page 515. This case is almost identical with the case at bar, and I therefore request a careful reading of the very lucid opinion of the court, especially pages 518 and 519. I quote from the syllabi as follows:

“One who lives adjacent to a street railway and owns considerable property there which he has improved, relying upon the facilities afforded by the line, has a material individual interest which entitled him to be a relator in a mandamus to enforce the operation of the line.”

“A street railway company which has received from the state and entered upon the enjoyment of a franchise

for its business cannot cease to operate the line without consent of the granting power.”

“The operation of a street railway can be enforced by mandamus where a company which has acquired a right and commenced to perform the service attempts to discontinue it.”

“The absence of any grant or privilege or franchise to operate a street railway will not relieve a company which has occupied the streets for such purpose for several years from the duty to continue the service.”

We maintain that the franchise granted to the railway company by the board of supervisors, when accepted becomes binding upon the company. The county says to the railway company, you may have the use of my streets upon which to operate your street car system. The street car company says to the county, we will take so much of your road and thereupon does take that portion of the road and builds a track upon it. It has a right to take more, within the limits of the franchise, if it desires. Whenever it takes and uses a portion of the road for the operation of its system, the franchise being thus accepted becomes a contract binding upon both parties. The railway company can force the county to permit the use of its roads according to the terms of the franchise, and the county or any one affected thereby can enforce compliance by the railroad company with its contract. As well said by Mr. Booth on Street Railways, page 6, “The franchise can be granted only for a public use and upon public consideration.” And further on page 10, “A franchise is a privilege conferred by the sovereignty upon natural or artificial persons exercising powers which they could not lawfully assume except in pursuance of such a grant. It emanates from the government, and owes its existence to a grant.” See also 27 Am. & Eng. Ency. of Law (2 Ed.), 23. “No escape for a breach of the conditions of the franchise is afforded by the mere fact that performance would

put the company to great inconvenience and cause a large outlay of money, or that by reason of insolvency it is unable to perform.” 27 Am. & Eng. Ency. of Law, p. 55.

Coming now to the last point which I shall discuss, to-wit: the order of the board of supervisors, declaring the extension to be a nuisance, I maintain that this order is void, *per se*. I deny that the board has a right to declare the property of any one a nuisance or an obstruction to the street and order its summary removal, without notice, much less without petition or complaint. Could the board declare the A. & V. R. R. track an obstruction to the Clinton road and put the convicts immediately to work and tear the track up, without notice to the owners of the railroad company? If this three hundred and fifty foot extension was an obstruction to the highway, the board should have given notice to the owners of this extension to appear to be heard and then should have taken some proof before adjudicating the matter. But even if the board had adjudicated it to be an obstruction, it had not the power summarily to remove it. It should have notified the owner to remove the obstruction or abate the nuisance. But I deny that the board had a right, without a hearing, to declare a thing an obstruction which had been in existence for five years, unless the owners, and others affected by the adjudication should be given an opportunity to be heard. I agree with witness McNeill, the board was made a cat's paw of, in order to furnish a defense for the railway company to hide behind.

Williamson & Wells, for appellee.

The board of supervisors, having the public road worked, went out and looked at it, declared it by proper ordinance to be an obstruction to the public road and had it removed. The railroad had no right to object and it could not use the track belonging to other per-

sons, and it is shown by the evidence in this case that it was an obstruction to the road, that it was built along the ditch that was necessary to properly drain the public road, and not in the middle of the road with a pass way for vehicles on each side. Mr. Livingston the owner of the land complained to the board that it obstructed the drainage and that in order to properly drain the road, they had dug a deep ditch through a small elevation in order to run the water west instead of east where it naturally ran, and that it made it impossible for him to enter his land, by reason of this deep ditch.

In accordance with this complaint the board ordered the track taken out of the way as an obstruction. In passing such ordinance the board exercised a right which it had by authority of law and which it had reserved to itself in the very ordinance granting the franchise.

Mr. Wright does not show that he had any clear and distinct legal right to demand that the street car company run up to the front of his store, and he has not shown that it was the duty of the railroad company to the public to maintain that three hundred feet of track on the side of the road and run its cars over it. Unless this is the case, Mr. Wright cannot maintain a mandamus. His only complaint, the court will see from reading his evidence, is that his trade might be cut off to some extent.

If he had any personal rights in the matter and was damaged by the railroad's not running its cars up to his store a clear and distinct and perfect remedy at law against the railroad company for any damages he might have sustained. Under that state of facts the law is clear and it is held in many jurisdictions that mandamus will not lie.

It is held by the court in Mississippi, in the case of *State Board of Education v. West Point*, 50 Miss. 638,

“mandamus only lies where there is a clear specific legal right and duty to be performed and there is no other adequate legal remedy.” Also in the following cases the same principle is laid down as the law.” *Swan v. Buck*, 40 Miss. 268; *Ross v. Lane*, 3 S. & M. 695; *Carrol v. Board of Police*, 6 C. 38; *Beaman v. Leake*, 42 Miss. 238; *Board of Police, Attalla Co. v. Grant*, 9 S. & M. 77.

We say that the lower court was correct in his decision of the case.

Argued orally by *J. R. McDowell*, for appellant.

McLEAN, J., delivered the opinion of the court.

The appellee and its predecessors operated a street railroad in the city of Jackson, having first obtained a franchise from the city. It also obtained a franchise from the board of supervisors of Hinds county, authorizing it to extend its line on the public road in the county. The railway company built its track out West Capitol street as far as a point known as Battle Hill, and afterwards the line was extended to where the Old Ladies' Home is now located. Afterwards, in the year 1903, a suburban park, known as Livingston Park, was opened up, and a pavilion where vaudeville performances were conducted was erected in said park. This park was about three hundred and fifty feet west of the western terminus of the street car line. The owners of this park, conceiving it to be to their interest to have the car line extended out to a point immediately in front of its pavilion, induced the railway company to extend its line to that point. The owners of the park were to furnish the steel rails, and the street railway company was to furnish the other materials and to construct the line, which was done. Prior to January, 1909, the lease on the Livingston Park expired, the pavilion was torn down, and the park discontinued. Thereupon the lessees of the park demanded of the street railway that it

purchase the steel rails which had been furnished by the park company, or pay rent on the same for the use thereof. The railway company declined to do either, and discontinued running its cars out from the Old Ladies' Home to this park, which is a distance of about three hundred and fifty feet. The appellants, being property owners near the Livingston Park entrance, were thereby deprived of the car service for this distance of about three hundred and fifty feet; and thereupon, on the second day of August, 1909, the appellants filed a petition for a writ of mandamus, praying the judgment of the court for a writ of mandamus to require the railroad company to continue to operate its cars to the point at the end of the line opposite Livingston Park.

While this suit was pending, and before it came to trial, the board of supervisors, at the regular September term, 1909, made an order to the effect that: "It appearing to the board that for a distance of about three hundred and fifty feet beyond the present terminus of the street railway line, in front of the Old Ladies' Home, a railroad track was constructed for the benefit of the Livingston Park Company, said track being built, as is shown by the recent survey of the public road, partly upon the public highway and partly upon the lands belonging to S. Livingston, the line between the lands of the said S. Livingston and the public road being located at or near the center of the said track, and it further appearing to the board that said track has been abandoned for the purposes for which it was constructed, and is no longer used to run cars upon, and is an impediment and obstruction to the public highway, and interferes with the proper drainage of the road, it is now ordered that the said track be taken up and removed from the public road, from a point at the entrance of what is known as Livingston Park, for a distance of about three hundred and fifty feet, to the point in front of the Old Ladies' Home, where the street cars are now

stopping. It is further ordered that Joe Lewis, sergeant of the county convict camp, be and is hereby directed to take up and remove said track as an obstruction to the highway." On a subsequent day of the same term the appellants in this case presented their petition to the board of supervisors, praying the board to vacate its order theretofore made, and, this petition coming on to be heard, it was rejected and refused by the board. These petitioners did not appeal from this order, but the order of the board stands in full force and effect. The petition for the mandamus coming on to be heard, and tried by agreement before the circuit judge, it was adjudged that the petitioners were not entitled to the relief prayed for, and the petition was denied, and the suit dismissed, and from that judgment an appeal is prosecuted to this court.

Upon the very threshold of their case, appellants are met with the proposition that the board of supervisors found that the track of the defendant railway company had been abandoned for the purposes for which it had been constructed, and declared it a nuisance, ordered it to be removed, and in pursuance of said orders the sergeant of the county convict camp removed the said railroad track. The argument of the appellant is that the order of the board is void because it was procured through fraud; the evidence of fraud being that the order was passed at the instance of the street railway company, and that consequently the defendant cannot defend under such circumstances. Granting that the order was procured at the instance of the defendant, there can be no question that the appellee had the right to surrender its franchise with the consent of the board that granted the franchise. The board has full jurisdiction over the public roads, conferred upon it by the Constitution, and manifestly, in a proceeding like this, the courts have no power to interfere on the sole ground that the action of the board was unwise or not condu-

cive to the public good, if, indeed, in any proceeding, the courts have this power. *Monroe County v. Strong*, 78 Miss. 565, 29 South. 530. Suppose that this court should grant the prayer of appellant's petition, and command the street railway company to restore the track; would not the board of supervisors still have the power to deny to the street railway company the right to lay and maintain its track upon the public roads of the county? Courts will not do a vain thing.

Under the proceedings in this case the question as to the power of the board to revoke the franchise and to cause to be torn up the track of the street railway company cannot be raised. This is a mere collateral attack made upon the judgment entered by the board, and if this judgment can be annulled, the fact that the street railway company consented to the order is not sufficient to justify us in holding that the order was void. The granting by the board of supervisors to the railroad company of the privileges or franchises as being grants of vested rights, of which the grantee cannot be deprived at the will of the board, is not involved in this controversy. It may be and doubtless is true, but as to which we express no opinion, that the grant is a vested right, and that the railroad cannot be deprived of it, except by a judicial proceeding, of which it must have due and legal notice. But as the grantee has not and does not complain of the action of the board in ordering the track removed, we are not aware of any principle which will authorize, in a proceeding like this, any court to compel the railroad to rebuild the track and to resume its service.

Affirmed.

GEO. W. TAYLOR v. FARMERS FIRE INSURANCE Co.

[58 South. 353.]

1. **INSURANCE. Actions. Limitations by contract. Code of 1906, Secs. 2575, 3126, 3127. Constitution 1890, Sec. 87.**

Code 1906, Sec. 2575, providing that conditions or stipulations in insurance contracts limiting the time within which suit may be brought thereon to less than one year, shall be void does not prevent such contractual limitation for a period of not less than one year.

2. **SAME.**

Code 1906, Sec. 3127, providing that the limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between the parties etc., does not repeal or nullify Sec. 2575, in view of the facts that these two sections were adopted at the same time, are in different chapters and that Sec. 3126 in the same chapter as Sec. 3127 provides that chapter shall not apply to any suit which is limited by any statute to be brought within a shorter period than is prescribed in such chapter, and because repeals by implication are not favored by the courts.

3. **CONSTITUTION 1890, SEC. 87. Special or local laws. Limitation of actions.**

Constitution 1890, Sec. 87, prohibiting the enactment of special or local laws or the suspension of general laws, etc. is not violated by Sec. 2575, Code 1906, permitting insurance companies to make contracts limiting the time in which suits can be brought thereon to not less than one year.

APPEAL from the circuit court of Yazoo county.

HON. T. H. CAMPBELL, Special Judge.

Suit by Geo. W. Taylor against the Farmers Fire Insurance Company. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Coleman & McClurg, for appellant.

The first proposition of appellee is for a harmonious construction that will save the force of both statutes.

The second is, that section 3127 is repugnant to state and Federal Constitutions because it limits the right of contract.

The third is, that "this statute" is in derogation of the common law.

And the fourth and final proposition presented is, that section 3126, controls this issue.

We rely in answer, on Sec. 87 of the Constitution of Mississippi.

"Sec. 87. No special or local law shall be enacted for the benefit of individuals or corporations, in cases which are or can be provided for by general law, or where the relief sought can be given by any court of this state; nor shall the operation of any general law be suspended by the legislature for the benefit of any individual or private corporation or association, and in all cases where a general law can be made applicable, and would be advantageous, no special law shall be enacted."

We insist that section 2575 is condemned by this section of the Constitution because it is a special law for the benefit of a particular class or private corporations in cases which can be provided for by general law, as in section 3127, and in which relief can be given by the courts of this state.

If this court should call for a substantial legal reason for this special privilege, it would get no satisfactory answer. The effect of counsel on this point is demonstrative.

There is no question as to the promotion of the health, peace, morals, education and good order of the people, or to legislate so as to increase the industries of the state, develop its resources, or to add to its wealth and prosperity. 4 Ency. U. S. Rep. 356 and notes. There must be a substantial reason. 32 L. R. A. 664.

If we correctly understand the second contention, set up in counsel's brief it is that, this court is invited to hold that a state may not make a fixed rule for the limitation of actions because it would deprive the people of the right to contract for any limitation that they might desire, in violation of the fourteenth section of our state Constitution, which is, "No person shall be deprived of life, liberty or property except by due process of law." Our object is to hold the appellee and the legislature to this fundamental principle. "Liberty" is free and alike to all, even in contractual relations; not a special blessing to be conferred by law upon a privileged few, or a fire insurance company.

If the fourteenth amendment to the Federal Constitution prohibits the state from enacting a general law on the subject of limiting the time for bringing actions, then we favor "the modification of the fourteenth amendment." And, if necessary to preserve this time, honored power of the state to "repeal the fifteenth."

As we understand it, a statute in derogation of the common law must be strictly construed. It is not void. But the burden is upon those who claim exemption to strictly show cause.

Appellee is given an exception to the general statute of limitations. This being true, we find the rule in *Covington v. Frank*, 77 Miss. 618; "It is a rule in the construction of statutes that exceptions must be strictly construed. And where a strict construction is resorted to, the person or thing excepted must come within both the letter and the spirit of the act." Section 2575 has in it that which killeth, but none of that which giveth life.

"A thing which is within the letter of the statute is not within the statute, unless it be within the intention of the lawmakers." *Ott v. Lowry*, 78 Miss. 487; *Adams v. Yazoo*, 75 Miss. 275; *State v. Henry*, 87 Miss. 125.

The appellant could have sued any person, partnership or other corporation than the appellee at any time

within six years after the cause of action arose. He is unjustly discriminated against and denied an equal right against appellee and the due process of law in dealing with this particular insurance company.

There is no question here as to the repeal of section 2575 by section 3127. They are *uno flatu*. One breath, half pure, half foul. Section 2575 a kind of second breath. Both sections born at the same time from the same womb, but not quite twins, 3127 being the child, 2575 the "placenta."

Section 3126 simply applied to any express statute of shorter limitation. It has no application to 2575 because no definite limit is therein fixed except the positive prohibition of one year. "May" is not in it, but "December" is.

Class legislation—"Class legislation is of two kinds namely, that in which the classification is natural and reasonable, and that in which the classification is arbitrary and capricious." 7 Cyc. L. & Pro. 136, note 81; 46 L. R. A. 393.

Section 2575 comes within the condemnation of both classifications, because it is not natural and reasonable that fire insurance companies alone should be thus protected above all other classes of litigants, nor should policy holders alone be so discriminated against, and it is arbitrary and capricious, because there is no substantial reason why appellee's class should be thus favored to the inequality of appellant's class; especially in this state whose public policy is pronounced in favor of placing all corporations under general law. An examination of the authorities quickly show that this appellee is not entitled to this special privilege for any of the reasons upon which they are sometimes granted. 4 Ency. U. S. Rep. 362, note, 97; 8 Cyc. L. & Pro. 1036, *et seq.*

Suppose section 3127 had appended to it this clause, "But this section shall not apply to fire insurance com-

panies.” It could not stand the constitutional test. It might as well have been written there as in section 2575. See *Rhode v. Kelly*, 88 Miss. 209. In Rhodes case the police powers of the state were involved. In the instant case, none of them.

“A statute may be so framed that, while perfectly fair and valid on its face, it is susceptible of unfair and unequal administration. In such case, its enforcement in an unequal and arbitrary manner for the purpose of oppressing any particular individual or class will be relieved against by the the courts.”

“But it must be shown that in its actual enforcement it is unequally and arbitrarily administered and used as an instrument of oppression against the class against whom it was directed.” The record in this case shows, as we think, 2575 unconstitutional in that it is an attempt at class legislation favoring fire insurance companies, and in that it is especially aimed at those alone taking policies and suffering loss. And more, the defense and judgment in this case shows the arbitrary administration of it. 4 Ency. U. S. Rep. 367.

We respectfully submit that Sec. 2575 of the Code should be declared unconstitutional.

McWillie & Thompson, for appellee.

The only question involved in this case is whether, or not, when more than a year has elapsed since the date of a loss, the stipulation in a fire insurance policy that no suit shall be brought on the same after the lapse of such period is an available defense in view of Sec. 3127 of the Code of 1906. This section is as follows:

“3127. Period of limitations not to be changed by contract. The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contract stipulation whatsoever shall be absolutely null and void; the object of this statute being

to make the period of limitations for the various causes of action the same for all litigants.”

There would be no doubt of the effect of this section as cutting off the defense but for another section of the same Code. We refer to section 2575 which is as follows:

“2575. No stipulation as to jurisdiction. No company shall make any condition or stipulation in its insurance contract concerning the court or jurisdiction wherein any suit thereon may be brought, nor shall they limit the time within which such suit may be commenced to less than one year after the loss or injury, and may such condition or stipulation shall be void.”

Both of the above provisions appear in the Code of 1906 which went into effect on October first of that year. Like all Codes, the one in question must be construed as a whole. *Ferguson v. Monroe County*, 71 Miss. 524; 26 Am. & Eng. Ency. Law (2 Ed.) 617; 26 Cyc. 1167.

And every section of it must be given effect if possible. *Martin v. O'Brien*, 34 Miss. 21; 26 Am. & Eng. Ency. Law (2 Ed.) 618; 36 Cyc. 1128.

The rule has been well stated as follows:

“Where two statutes are in apparent conflict, they should be so construed, if reasonably possible, as to allow both to stand and to give effect to each.” 36 Cyc. 1146.

Taking the Code as a whole and seeking to reconcile the apparent conflict between the sections we have quoted, we should state the effect of the two provisions to be that all contractual limitations on the time for suit shall be unavailing as a defense to litigants except that insurance companies may limit the time to one year from the loss.

This view of the case is much strengthened by the rule which has been stated as follows:

“Where there is one statute dealing with a subject in general and comprehensive terms and another dealing

with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute." 36 Cyc. 1151; 26 Am. & Eng. Ency. Law (2 Ed.) 619.

Manifestly the subject of a contractual limitation upon suits against insurance companies was particularly engaging the attention of the lawmakers when section 2575 was enacted while the general subject of limitations of actions and the effect of contractual stipulations on the same were in view when section 3127 was enacted.

Section 3127 is one to be strictly construed for two reasons:

First, it is one in derogation of personal right, as the right to make contracts. *Prescott v. Railroad Co.*, 73 Fed. 438; 26 Am. & Eng. Ency. Law (2 Ed.) 662; 36 Cyc. 1173.

Second, it is one in derogation of the common law, such a contractual limitation being valid at common law, *Hemingway v. Scales*, 42 Miss. 1; Am. & Eng. Ency. Law (2 Ed.) 662.

The meaning of section 2575 being plain, it must be given effect unless it can be said to have been repealed by section 3127. It cannot be said to have been repealed because both sections went into effect at the same time and the Code of which they both form parts is to be treated as an entirety. Moreover, it is not expressly repealed and repeals by implication are not favored. In cases of seeming conflict, the courts will, if possible, adopt such construction as will give effect to both. *Smith v. Vicksburg*, 54 Miss. 615; *Pons v. State*, 49 Miss. 1; *Beard v. Lee County*, 51 Miss. 542; *Deaton v. Burchart*, 59 Miss. 144; *Board of Education v. Aberdeen*, 56 Miss. 518.

Again, it cannot be doubted that section 2575, provides a limitation of one year as to actions on all policies of insurance containing a corresponding stipulation and under another provision of the Code, Sec. 3126, it is necessarily controlling.

This section reads as follows:

“The provisions of this chapter shall not apply to any suit which is or shall be limited by any statute to be brought within a shorter period than is prescribed in this chapter, but such suit shall be brought within the time that may be limited by such statute.”

Undoubtedly section 2575 is a statute not in the chapter on “Limitation of Actions,” which affirmatively recognizes the right to limit to a shorter period the right of action on such policies of insurance; and that the legislature meant that such period should govern the case is perfectly manifest. The three Code sections taken together fully justify the action of the court below in overruling the demurrer to defendant’s fifth plea. We refer the court to the able opinion of Hon. T. H. Campbell, special judge, which is made a part of the record.

We have hitherto considered only the question of construction but there is also involved the question as to whether, or not, section 3127 was within the legislative authority, if intended to include such stipulations in insurance policies. In other words, could the legislature thus restrict the liberty of contract without doing violence to the fourteenth amendment to the Federal Constitution providing that no state shall deprive any person of life, liberty or property except by due process of law.

The term “liberty” as protected by the Federal and State Constitutions includes the liberty of contract. 18 Am. & Eng. Ency. Law (2 Ed.) 1125, 25 Cyc. 590 and cases cited in notes. An insurance company is not a public service corporation, the reasonableness of all

whose regulations is subject to legislative control; and it is noteworthy that without section 2575 being in any way involved Chief Justice Mayes, when applying section 3127 to the facts presented in *Dodson v. Telegraph Co.*, anticipated the distinction between the two classes of corporations now drawn, remarking in his response to the suggestion of error, that "The attitude of a public service company towards the public is quite different from that of an insurance company." 52 South. 693.

McLEAN, J., delivered the opinion of the court.

The appellant brought suit on a fire insurance policy issued by appellee. The defendant, among other pleas, pleaded that there was a provision in the policy to the effect that no suit or action on the policy for the recovery of any claim shall be sustainable, unless commenced within twelve months next after the fire. The plaintiff demurred to this plea. The demurrer being overruled, plaintiff declined to reply, and judgment was entered for the defendant.

The distinguished gentleman who presided as special judge in the court below delivered the following opinion:

"This matter is submitted on the demurrer to the defendant's fifth plea, which sets up the bar for one year provided in the policy as a defense to the declaration. The question submitted involves the construction of section 2575 of the Code of 1906, which is in the following language: 'No company shall make any condition or stipulation in its insurance contract concerning the court of jurisdiction wherein any suit thereon may be brought, nor shall they limit the time within which such suit may be commenced to less than one year after the loss or injury, and any such condition or stipulation shall be void.' Section 3127 provides as follows: 'The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any

contract stipulation whatsoever shall be absolutely null and void, the object of this statute being to 'make the period of limitations for the various causes of action the same for all litigants.' Does section 3127, *supra*, repeal section 2575? I think not. The two statutes were passed *pari passu*. The Code was adopted at the same time as far as these chapters are concerned. These two statutes must be construed, if possible, so as to permit both to stand, as repeals by implication are not favored by the courts. The insurance chapter is a chapter distinct by itself. Section 3127 by its terms says: 'The limitations prescribed in this chapter shall not be changed,' etc. The limitation in section 2575 is entirely a distinct chapter, and it was in regard to a subject that was the object of special legislation. It is contended that section 2575 does not give a positive right to an insurance company to contract for a shorter period for bringing suit on its policy than the periods of limitation prescribed in chapter 87, section 3127; but, if any effect is to be given to the language in section 2575, it must be that the right is given by necessary implication to insurance companies to contract for a period of limitations not less than one year. I conceive that section 2575 is to be construed as if it read 'insurance companies shall have a right to contract that no suit shall be brought upon its policy after the expiration of one year from the loss or injury.' In this connection I call attention to section 3126 of the Code, which is as follows: 'The provisions of this chapter shall not apply to any suit which is or shall be limited by any statute to be brought within a shorter period than is prescribed in this chapter, but such suit shall be brought within the time that may be limited by such statute.' Section 2575 of chapter 69, having said in substance, as I construe it, that suits upon insurance policies shall not be brought after the expiration of one year from the date of loss or injury, and section 3126, chapter 87, having held this

permissible, judgment is that the demurrer to the fifth plea be and is hereby overruled.”

We fully concur in this most excellent exposition of the law in this case.

Appellant earnestly contends that section 2575 of the Code of 1906 is unconstitutional, in this: That it conflicts with section 87 of the Constitution of 1890, which prescribes that “no special or local law shall be enacted for the benefit of individuals or corporations, in cases which are or can be provided for by general law, or where the relief sought can be given by any court of this state; nor shall the operation of any general law be suspended by the legislature for the benefit of any individual or private corporation or association, and in all cases where a general law can be made applicable and would be advantageous, and no special law shall be enacted.”

We confess, without entering into a full discussion, our inability to appreciate the argument of appellant upon this proposition. *Affirmed.*

MRS. E. L. CORLEY v. M. M. BISHOP.

[58 South. 360.]

1. **WILLS. Testamentary trustee. Power of sale. “Proceeds.”**

If a sale of the real estate is necessary to carry out the purpose of the testator, the power of the testamentary trustee to make the sale will be given by implication as otherwise the intention of the testator might be defeated.

2. **SAME.**

Where under the provisions of a will the duty was imposed upon a testamentary trustee to distribute the “proceeds” of real and personal property equally between the beneficiaries, from the use of the word “proceeds” the inference must be that a sale of the property was implied.

APPEAL from the chancery court of Smith county.

HON. SAM WHITMAN, JR., Chancellor.

Suit by Mrs. E. L. Corley against M. M. Bishop.

From a decree for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Wills & Guthrie, for appellant.

No brief of counsel for appellant found in the record.

Deavours & Shands, for appellee.

It is true that there is no express power given by the instrument to John Minor Hord and Mary Ann Hord to make a conveyance of this property; and such power, if it exists, must be implied from the terms of the instrument or it must be clear that such authority is necessary in order to effectuate the intention of the person making the devise.

It is a fundamental rule of law that in the construction of wills we must look to the intent of the testator; and in the administration of the property devised must manage it and dispose of it in accordance with the intent of the testator, if that can be discovered. We must put ourselves in the place of the party making the devise and discover, if we can, what he intended to do or what he would not do could life be given him for the moment to interpret his own act while living. See *Gordon v. McDougal*, 84 Miss. 721, citing especially *Watkins v. Sanden*, 20 Am. St. Rep. 205; *Murphy v. Carlin*, 35 Am. St. Rep. 701-2; *Morse v. Hackensack*, 12 L. R. A. 62.

The true intent and meaning of the testator can best be ascertained by the court by putting themselves in the place of the testator and by reading his will in the light of the environment that surrounded him at the time of its execution. *Hall v. Stevens*, 27 Am. Rep. (Mo.) 302; *Noe v. Kern*, 3 Am. St. Rep. 544; *Monroe v. Collins*, 95 Mo. 33. When that intent and meaning can be thus ascertained, then all else should be disregarded. (See above authorities.)

No particular form is necessary to create a trust or a power thereunder. *Schmuckers v. Reel*, 61 Mo. 598. The intent of the testator must govern in the construction of wills and will be given effect always when not against public policy, and not in contravention of law. *Dickison*, 138 Ill. 541, 32 Am. St. Rep. 163; *Green v. Green*, 21 Am. St. Rep. 743. And the whole instrument must be examined in order to ascertain the intent of the testator. *Watkins v. Sanden*, 93 Ky. 501; *Schlottman v. Hoffman*, 73 Miss. 199.

It is to be remembered that in order to carry out the intention of a testator, the terms used in the will are given a broader meaning than they would be given in other instruments. "In the construction of wills, words in general are to be understood in their plain and usual sense, in the absence of a manifest intention to the contrary." 29 Ency. (1 Ed.) 345. Many authorities are there cited.

Again, where a conveyance of property in trust is susceptible to two interpretations, the one should be adopted which will carry out the main purpose of the donor and best given effect to the scheme had in view by him. *Dexter v. Episcopal City Mission*, 134 Mass. 394. See also *Butler v. Moore*, 94 Ind. 359.

It is also fundamental that in giving construction to a will, a construction should be given thereto that is reasonable and sensible. It is to be presumed that a testator intended to do that which was best to be done if there is ambiguity and uncertainty about the meaning of the instrument. And, so, if a will be subject to two constructions or interpretations and one is sensible and advantageous and the other not so sensible and advantageous, the court will certainly adopt that construction and that interpretation which is the more sensible and the more advantageous of the two.

In our opinion, the word in the will under consideration that is the key with which all the mysteries of the instrument can be easily unlocked is "proceeds."

The word "proceeds," as the court will note appears in this instrument, presumptively, the word was used purposely and with a certain intention and design on the part of the testator. It must be conceded that the testatrix knew what she was doing when she executed this will; and that she understood the form and the effect of it and that she used the words embraced in the will including this word "proceeds" advisedly and with a fixed and certain purpose in her mind. It is to be noted also that the word "proceeds" has reference both to the personal property and to the real property of the testatrix; this is apparent because, after the use of the words "all my property, both personal and real," she uses the words "proceeds of said property," showing thereby beyond the suggestion of any doubt that the term "proceeds" is used in reference to the land exactly as it is used in reference to the personal property.

Now, what does the word "proceeds" mean?

Webster defines it as the returns; the eclectic dictionary defines it as the produce or amount proceeding or accruing from some possession. To be more specific, the amount, sum or value realized by the sale of goods, etc. Again it is defined as, "that which arises from a thing; that which arises from anything sold, bartered or exchanged, or anything proceeding from or produced by another thing; the amount proceeding or accruing from some possession or transaction, especially the sum derived from the sale of goods, etc." *Phelps v. Harris*, 101 U. S. 370-380, 32 Cyc. —; *Armour Packing Company v. London*, 31 S. E. 500; *Allen v. Barnes*, 5 Utah, 100; see especially *Hallman v. Tigges*, 7 Atl. 347 and 348, 42 N. J. Eq. (15 Stew.) 130.

The only reasonable construction that can be placed upon this instrument containing as it does this word "proceeds" is that the testatrix intended for John Minor Hord and Mary Ann Hord to have the power and to have the authority to dispose of the land.

Argued orally by *Thomas J. Wills*, for appellant.

McLEAN, J., delivered the opinion of the court.

This is a bill, filed by appellant, for the purpose of removing clouds upon the title of complainant to certain real estate. The bill alleges that Mrs. Mary Ann Hord was the owner in fee of the real estate described in the bill; that she made a certain will, and the trustees named in the will sold the property devised. Further, that there was more than ample personal property to pay all personal debts and obligations, together with the funeral expenses, of the said testatrix, belonging to her said estate at the date of her death. The will is in the following words: "Know all men by these presents: That I do hereby give and bequeath unto John Minor Hord and Mary Ann Hord all my property both personal and real, for the use of Mary Elizabeth Leilea and Julia Emma Hord. The proceeds of said property to be equally divided after my personal expenses are met."

It may be stated as a general proposition that the power of sale will be implied, wherever duties are imposed on the trustee which cannot be performed without it. There is some conflict in the authorities on this proposition; but the weight, together with the better reason, sustains this proposition.

In *Livingston v. Murray*, 39 How. Prac. (N. Y.) 102, the law is thus stated: "The general rule is that, if a sale of the real estate is necessary to carry out the purposes of the testator, the power to make the sale will be given by implication, as otherwise the intention of the testator might be defeated. In those cases, it will be presumed that the testator, having in view the duty imposed upon the executors of his will, intended they should sell his real estate, and omitted, through mistake or otherwise, to confer express power." In *Gray v. Henderson*, 71 Pa. 368, *Myer's Appeal*, 62 Pa. 107, *Winston v. Jones*, 6 Ala. 550, *Putnam Free School v. Fisher*, 30 Me. 523, and *Belcher v. Belcher*, 38 N. J. Eq. 126, the proposition is stated that an implied power of sale is

given to the executor, where the testator blends the proceeds of both real and personal estate into one fund for the purposes of distribution or accumulation.

In *Winston v. Jones*, 6 Ala. 554, it is held that no precise form of words is necessary to the creation of a power, but if the intention to confer the power is apparent to enable the executor to execute the trusts of the will the power will be implied; and in 2 Perry on Trusts (Sec. 766) we find the rule stated to be that any words which show an intention to create a power of sale, or any form of instrument which imposes duties upon a trustee that he cannot perform without a sale, will necessarily create a power of sale in the trustee. See, also, extended notes to *Rankin v. Rankin*, 87 Am. Dec. 209, *et seq.*

While some authorities draw a distinction between the duties, rights, and powers of executors and of a mere naked trustee as to the payments of debts and distribution of the estate, yet the fact that the trustees in this case are not made executors we do not deem important. It may be that the testament did not impose upon the trustees the duty of meeting the personal expenses of the testatrix. This, however, is very doubtful; but it is certain that the duty was imposed to distribute the proceeds of the property equally between the beneficiaries. While the word "proceeds" is sometimes equivocal in its meaning, yet, when taken in connection with its context in this instrument, the inference must be that a sale was implied. Sometimes the word "proceeds" is construed to mean rents, issues, or income; but in the present instance we cannot understand how the proceeds of the property can be divided until after the property is converted into money by a sale. Such was the construction placed by the lower court upon this will; and the case is affirmed. *Affirmed.*

GABE CHATMAN ET AL. v. AMANDA POINDEXTER.

[58 South. 361.]

1. HOMESTEAD. *Conveyances. Validity. Code 1906. Sec. 2159-2156.*

A conveyance of the homestead by the husband living with his wife thereon, to the wife and other grantees is under Code 1906, Sec. 2159, so providing invalid as to the grantees therein other than the wife unless signed by the wife.

2. SAME.

The fact that such deed was executed in payment of a claim against the grantor for labor "done and performed" and that under Sec. 2156, Code 1906, the land conveyed was not exempt from execution, does not dispense with the necessity of the wife's signature to the deed.

APPEAL from the chancery court of Leflore county.

HON. M. E. DENTON, Chancellor.

Suit by Gabe Chatman et al. against Amanda Poin-dexter. From a decree dismissing the bill, plaintiff ap-peals.

The facts are fully stated in the opinion of the court.

Coleman & McClurg, for appellants.

We sincerely hope that the supreme court is more con-versant with equitable estoppel than seem solicitors for appellee, and can surely see that appellee is estopped by her own wrong, in having this deed made to herself and grandchildren, for their claim for work and labor per-formed, and now tries to defeat them for her own ben-efit, because forsooth, a deed delivered to her, as an es-crow (?) was not joined in by herself to herself.

If ever equity can interfere to prevent a wrong, where will you find a stronger case?

Gardner & Whittington, for appellee.

The learned counsel for appellee say, in their brief, that a husband can make a valid conveyance of the homestead to his wife, without her joining in the deed, and cite Thompson on Homestead and Exemptions, Sec. 473, 21 Cyc. 536. If the conveyance of the homestead had been executed by Gabe Poindexter to his wife entirely, we do not think it would have been necessary for Amanda Poindexter to have joined in the conveyance. It is not disputed that the husband could convey the homestead to the wife, without her joining in the conveyance, in Mississippi. Some jurisdictions, as shown by the very authority cited by counsel for the appellants, require the wife to join in such conveyances to herself. In Thompson on Homestead and Exemptions, Sec. 473, quoted by counsel for appellants, we read: "The policy of these statutes which restrain the alienation of the homestead without the wife joining in the deed, is to protect the wife and to enable her to protect the family in the possession and enjoyment of a homestead. They are not intended to oppose obstacles in the way of a conveyance of the homestead to the wife and children, with the consent and approval of the wife, whatever may be the form of conveyance." The wife, Amanda Poindexter, did not consent and did not approve of the delivery of the deed to the appellants. It was taken from her trunk, without her knowledge or consent and recorded without her knowledge. The authority just quoted does not support the contention of the appellants, because the appellants were not the children of the grantor. They were not related to the grantor in any wise. The record shows that Amanda Poindexter had only one child living, her son, Ike Poindexter, about forty years of age. Homestead statutes are too liberally construed in favor of the exemptionist. *Gilmore v. Brown*, 93 Miss. 63.

Counsel for appellants contend that it was not necessary for the wife to join in the conveyance of the home-

stead, because of the recital in said alleged conveyance about labor done and performed. Under Sec. 2156 of the Code of 1906, property is not exempted, when the judgment is for labor performed. There was no judgment in this case, and a mere recital of labor done and performed does not meet the demands of the statute. The appellants, as shown by the testimony, had been reared from their infancy almost by Gabe Poindexter and Amanda Poindexter, had been supported and sent to school by this aged couple, and the appellants as children had probably done work about the farm, as children would ordinarily do. The homestead would not have been exempted from a judgment for labor done and performed, and the statute quoted must be strictly construed. 21 Cyc. 520, 523, and 1206. The conveyance executed by Gabe Poindexter, covering the homestead in question was absolutely void, because the wife, did not join in the conveyance, as required by Sec. 2159 of the Code of 1906.

Argued orally by *W. M. Whittington*, for appellee.

SMITH, J., delivered the opinion of the court.

Gabe Poindexter, now deceased, being the owner of the land in controversy, to-wit, the south half of the northwest quarter of section thirty, township twenty, range two east, in Leflore county, Mississippi, executed and delivered to Amanda Poindexter the following deed: "In consideration of labor done and performed by Mandy Poindexter, my wife, and Ellen Chatman, Walter Chatman, and Gabe Chatman, and the further consideration of ten dollars in cash paid, I grant, bargain, sell and convey to said above-named parties one-half of the south half of the northwest quarter of section thirty, township twenty, range two east, in Leflore county, Mississippi." Amanda Poindexter was the wife of Gabe Poindexter, and Ellen Chatman, Walter Chatman, and Gabe Chatman, appellants herein, were Amanda's grandchil-

dren by a child of a former marriage. There was some evidence on the part of appellee indicating that this deed was never in fact delivered; but this evidence becomes immaterial, as will appear later on. Several years after the death of Gabe Poindexter, appellants, grandchildren of Amanda Poindexter, instituted this suit, alleging that by virtue of this deed they, together with Amanda, owned an undivided half interest in the land, and that Amanda was the owner of the other half interest therein, and asking for a partition thereof. Appellee filed a cross-bill, asking that this deed be canceled as a cloud on her title, and from a decree canceling the deed and dismissing appellants' bill, this appeal is taken. At the time the deed in controversy was executed, Gabe Poindexter was living with Amanda, his wife, on the land in controversy, which constituted his homestead.

It may be, as contended by appellee, that this deed, in so far as it conveys an interest in the land to the wife, is valid, as to which we express no opinion; but, in so far as it attempts to convey any interest in the land to appellants, it is void under the provisions of Sec. 2159 of the Code of 1906, which provides that a conveyance of the homestead shall not be valid unless signed by the wife, or the owner, if he be married and living with his wife. The purpose of this statute cannot be defeated by merely joining the wife as one of the grantees in a deed to the homestead.

One of appellants' contentions is that the deed was executed in payment of the claim of appellants against Poindexter for "labor done and performed," and that consequently, under the provisions of Sec. 2156 of the Code, the land in controversy was not exempt from execution, and that, therefore, it was unnecessary for the wife to sign the deed in order for the same to be valid. Section 2159 contains no such exceptions as this. Conceding for the sake of the argument, but not deciding that a sale of a homestead under an execution issued

upon a judgment for labor performed would be valid under section 2156, it by no means follows that a conveyance thereof by the husband without the signature of the wife in settlement of a claim for labor performed would be valid. Such a conveyance is governed solely by section 2159. *Affirmed.*

Suggestion of error filed and overruled.

J. S. THOMAS v. FIRST NATIONAL BANK OF GULFPORT.

[58 South. 478.]

1. **FORGERY.** *Elements of offence. Banks. Payment of draft on fraudulent endorsement. Liability of bank to owner.*

Where a bank check is payable to the order of a person and another person of the same name of the payee gets hold of it and indorses it to a party who takes it in good faith and for value, such party acquires no title to the check.

2. **SAME.**

If the indorsement in such case is made by a person who is not the real payee, but has the same name as the real payee, is made by such person with full knowledge that he is not the real payee, and with intent to perpetrate a fraud his indorsement is a forgery.

3. **SAME.**

Banks taking checks must know the true parties claiming to own them—in fact who do own them, and they act at their peril in paying them.

APPEAL from the circuit court of Harrison county.

HON. T. H. BARRETT, Judge.

Suit by J. S. Thomas against the First National Bank of Gulfport. From a judgment for defendant, plaintiff appeals.

AGREED STATEMENT OF FACTS.

“It is agreed by and between the parties hereto: That on and previous to the 23d day of October, 1909, the plaintiff, who is a white man and a citizen of said Harrison county, and whose business was that of riding about buying cattle, had on deposit in the First National Bank of De Funiak Springs, Fla., a balance of account of two hundred and eleven dollars, and that the plaintiff (who was then, and for some time had been, living, and is now living, at a point between Gulfport and Lyman, in said Harrison county, but nearest to Lyman, the two points Gulfport and Lyman being eight miles apart) wrote a letter to the said bank at De Funiak Springs, requesting said bank to send said sum of two hundred and eleven dollars to him at Gulfport, by letter, care general delivery, Gulfport, Miss., and in accordance with said instructions of plaintiff, said bank at De Funiak Springs made out its draft No. 12699 for said sum of two hundred and eleven dollars on the National City Bank of New York, payable to the order of J. S. Thomas, intending the plaintiff, and immediately mailed same in the United States postoffice at De Funiak Springs, Fla., addressed as follows: ‘J. S. Thomas, Gulfport, Miss.’ The plaintiff had theretofore been writing some of his letters from Lyman, Miss., and some from Gulfport, and had been getting his mail, some at Lyman and some at Gulfport. However, the letter written by plaintiff to the said bank at De Funiak Springs was written by plaintiff from said Gulfport. There lived, and had for some years lived, in Gulfport a certain negro named J. S. Thomas, who can and could read and write, and who had a bank account at the First National Bank of Gulfport, the defendant herein (an itemized statement of whose entire deposits in defendant’s bank to the date hereof is attached hereto as ‘Exhibit C’), and who received his mail at said Gulfport. The authorized signature of said negro was filed by him with the defendant

bank on February 4, 1907, where it still remains. When, by due course of mail, the letter from said Florida bank, containing said draft, reached the United States post-office at Gulfport, about October 25, 1909, the said negro, J. S. Thomas, was the first of said two persons of said name to call at the general delivery for the mail of J. S. Thomas, and the postal authorities in charge delivered the said letter to him. The said negro opened said letter, and coming into possession of said draft, took it on, to wit, October 26, 1909, during regular banking hours, to defendant's bank, indorsed same, "J. S. Thomas," in his own proper signature and handwriting, falsely representing it to be his own, and that he was the true J. S. Thomas mentioned as payee therein, by so indorsing and presenting said draft, and requested defendant bank to cash the same. The said negro was known to the officer of said defendant bank who was acting as paying teller at the time, but was not the regular teller, as J. S. Thomas, a depositor thereof, and the said officer of said defendant bank having compared the indorsement "J. S. Thomas" on the back of said draft with the signature of said negro, J. S. Thomas, on file, as aforesaid, and finding them to correspond, but without further inquiry, thereupon paid the amount called for by said draft, to wit, two hundred and eleven dollars in cash, to said negro, J. S. Thomas, but said paying officer of defendant took no other means to ascertain the identity of said payee, J. S. Thomas, in the draft, merely paying said money upon its presentation and comparison of signature, as aforesaid. The original of said draft is herewith annexed, marked 'Exhibit A,' and made a part of this agreed statement of facts.

"The said defendant bank, at the close of its business on said October 26, 1909, in making up its items of paper to be forwarded to New York for payment, discovered that the said draft, Exhibit A, was erroneously safeguarded, as now appears on its face, in this,

to wit, that, while said draft was intended to be for the sum of two hundred and eleven dollars, it was stamped with a machine called a protectograph, which had been caused by said De Funiak Springs bank to be erroneously stamped thereon, 'Not over five dollars, \$5.00,' and thereupon, on said date, said defendant bank sent the said draft by mail to said De Funiak Springs bank, calling its attention to said error, and requesting said Florida bank to send another draft in its place and stead properly safeguarded, which letter reached said Florida bank on the next day, October 27, 1909, and said Florida bank on the same day took up and retained the said first draft, Exhibit A, and on the same day, in its place and stead and in lieu thereof, mailed to defendant bank a new draft, No. 12716, for two hundred and eleven dollars payable to said defendant bank, which is herewith annexed as 'Exhibit B,' and made a part of this agreed statement of facts, which said last draft was duly received by said defendant bank and by it at once forwarded to New York, where it was paid in full to defendant bank out of the funds of the said First National Bank of De Funiak Springs, Fla., by and in the said National City Bank of New York, as is the banking custom in such cases. The amount was charged by the said Florida bank against the account of plaintiff and balanced same. That the receipt and opening said letter containing said draft, and cashing of the same at the defendant bank, and the indorsement and presentation of the same by said negro, J. S. Thomas, were all and singular without the information, knowledge, or consent of the plaintiff, J. S. Thomas, and that upon learning from said Florida bank, upon inquiry, that the said sum of money, to wit, two hundred and eleven dollars, the proceeds of said draft, had been paid to the defendant bank, he went on, to wit, November 5, 1909, to said defendant bank and claimed said draft and proceeds thereof, and demanded payment of the same by the de-

fendant to the plaintiff, as the true owner of said draft, and then and there notified said defendant bank that said indorsement was a forgery, and that he had not indorsed the same. The defendant bank refused to pay said sum of two hundred and eleven dollars, or any part thereof, to the plaintiff, and still refuses, though often requested. Upon said demands being made, said defendant bank notified the United States postal authorities and the police authorities of the said city and endeavored to have said negro, J. S. Thomas, arrested, and requested plaintiff to have him arrested, or ascertain his whereabouts, for such fraudulent conduct and acts; but said negro was not found after search by all said parties, and it is believed by the parties that he left said community after having received said money on said draft as aforesaid.

“The plaintiff, J. S. Thomas, had also formerly been a depositor at the said defendant bank, but closed his account there September 14, 1908, and has done no business with said bank since said date. On the books of said defendant bank the address of said plaintiff, J. S. Thomas, is Lyman, Miss., and said defendant bank, while it was doing business with said plaintiff, sent his statements and other communications to him at Lyman. The said sum of two hundred and eleven dollars, or any part of it, was never placed to the credit of said plaintiff, and he has never received said money or any part thereof, from any source. The said plaintiff knew, when he wrote to the said Florida bank, that one (another) J. S. Thomas had been a depositor and customer of said defendant bank, but did not know him, and had never seen him, but did know that such a person did live, or at least had lived, in Gulfport. That all the indorsements upon said draft, Exhibit A hereto, are now as each originally was after being returned to said Florida bank, but the statement of ‘J. S. Thomas’ on the back thereof is not the signature of the plaintiff, that is to say, not his hand-

writing, nor was it written there with the knowledge or consent of the plaintiff. The words 'Paid Oct. 27, with our draft No. 12716 favor of First National Bank, Gulfport, Miss.,' were written on the back of Exhibit A by the DeFuniak Springs bank upon issuing Exhibit B hereto. That the negro, J. S. Thomas, who unlawfully took said draft, Exhibit A, as aforesaid, never had any deposit or balance with the said De Funiak Springs bank, and the said draft was not intended for him, but for the plaintiff; but said defendant bank knew nothing of either of said parties named J. S. Thomas having or not having any deposit in said Florida bank, nor which of said parties it was intended to have said draft, and was wholly without knowledge in that regard, but defendant bank did know that the plaintiff had been a depositor in defendant bank, and that his signature was there on file. It is further agreed that said cause may be heard without further pleadings before the judge of the circuit court aforesaid, without a jury, and before the supreme court if an appeal is taken, upon the above statement of facts (and the law applicable thereto), which are all the facts in the case."

Geo. P. Money, for appellant.

Under the facts in this case, as shown in the pleadings and agreed statement of facts, and under our statute abolishing forms of actions, the distinction between conversion and assumpsit for money had and received is immaterial; the declaration shows a good cause of action and that is all that is necessary, as this court has held so often that it is deemed unnecessary to cite the decisions to that effect.

A draft was stolen from the mail, payable to plaintiff's order; and the thief, having placed a forged endorsement upon it, sold it to one McKee, who in good faith collected from the drawer the money, and appropriated it to his own use; upon these facts it was held that the

owner was entitled to recover from McKee. *Shaffer v. McKee*, 19 Ohio, 526.

Where a check is not delivered to the payee, but his name is indorsed by another, who deposits it with a different bank than the one upon which it is drawn, which collects the proceeds, which bank is liable to the true owner (the payee) though it acts in good faith and without knowledge of the forgery; and a demand upon such bank for the proceeds, before suit or by the suit itself, made the check the property of the payee, and recovery could not be defeated on the ground of want of privity. *Farmer v. People's Bank* (Tenn.), 47 S. W. 234.

If a negotiable instrument, having a forged indorsement, comes into the hands of a bank, and is collected by it, the proceeds are held for the rightful owner of the paper, and may be recovered by him, although the bank gave value for the paper, or has paid over the proceeds to the party depositing the instrument for collection. 1 Morse on Banks and Banking, Sec. 248.

It is held to be the well-settled rule, "A check drawn in favor of a particular payee or order is payable only to the actual payee or upon his genuine indorsement; and if the bank mistake the identity of the payee, or pay upon a forged indorsement, it is not a payment in pursuance of authority, and it will be responsible." *Pickle v. Muse*, 88 Tenn. 381, 12 S. W. 919. To the same effect is *Chism v. Bank*, 96 Tenn. 641, 36 S. W. 387. "The logic of this holding," said the court of Tennessee in the case of *Farmer v. People's Bank*, *supra*, "it would seem, must necessarily be that one coming into the possession of such paper, either unindorsed or with a forged indorsement of the payee's name, could not successfully resist the title of the true owner, or, if it had been converted into money, a demand for its proceeds."

Where a certificate of deposit belonging to one Talbot was stolen, and by a forged indorsement came into

possession of the defendant bank, which subsequently collected it from the drawee, at the suit of the owner, the receiving bank was held liable for the proceeds of the certificate, though it acted in the utmost good faith and without any suspicion of the fraud practiced upon the true owner. *Talbot v. Bank*, 1 Hill. 295.

A check with the name of the payee forged upon it came to the possession of the defendant innocently, and was so collected by it; having done, so, it was compelled to respond to the claim of the true owner, upon his discovery of the loss and fraud, though the bank had already accounted for the proceeds to the party from whom it had obtained possession. The court said: "It is clear, then, that nothing passed to the defendant by virtue of the forged indorsement. The plaintiff's right to the check remained precisely as it was before his name was forged. The check, therefore, when the defendant obtained the money upon it, was the property of the plaintiff; and in that case he may, as we have seen, recover the amount in this action, as money had and received by the defendant to his use." *Buckley v. Bank*, 35 N. J. L. 400.

While such an action would be for money had and received, it is held in *Salomon v. Bank*, 59 N. Y. Supp. 407, that action for conversion would lie for the amount.

The case of *Farmer v. People's Bank*, *supra*, reviewing the authorities, and coming to the conclusion we have cited, stated that *Johnson v. Bank*, 6 Hun, 124, and *Bobbett v. Pinkett*, 1 Exch. Div. 368, are to the same effect. These two authorities are not accessible to me.

Upon the objection that the action could not be maintained for want of privity, the court in *Farmer v. People's Bank*, *supra* (47 S. W. 234), says: "Although not actually delivered to plaintiff, yet his ratification by a demand upon the defendant for its proceeds, by this
made the check the property of Far-
without any lawful right, the defend-

ant converted it into money, it stood in the place of the original paper, and was equally the property of the plaintiff in error. In the one case no more than in the other, can the defendant in error resist the right of recovery of the true owner upon the ground of a want of privity; for the action against the wrongdoer does not rest upon privity; but upon the fact that he has intermeddled with property not his own, and, asserting a hostile claim, he has interfered with the lawful use and dominion of the owner of the property."

Negotiable bonds, payable to order, and bearing the indorsement in blank of the payee, were lost or stolen. The finder or thief erased the indorsements, and offered them for sale to the defendant, representing himself to be the person named in them as payee, and was identified as such by a person known to the defendant. The defendant agreeing to purchase, the officer indorsed the bonds with the name of the payee, and received for them their market value. The erasure of the indorsements was so made as not readily to attract attention, and the defendant purchased in good faith and in the regular course of business, and it was held that defendant acquired no title against the owner, who recovered them. *Colson v. Arnot*, 15 Am. Rep. 496, 57 N. Y. 253.

Where a bill is payable to the order of a person, and another of the same name obtains possession of it and indorses it to a third person in good faith and for value, the latter acquires no title; and where there are two persons of the same name, and one of them signs that name to certain notes with the intention that they shall be used in trade as the notes of the other, is forgery. *Beattie v. Bank*, 174 Ill. 571, 66 Am. St. 318.

In the last named case, the draft sued upon, though intended to be made payable to George P. Bent, was by mistake made payable to the order of George A. Bent, and was then mailed to George A. Bent, Chicago, Illinois. It was there received from the postoffice by a man

named George A. Bent, who indorsed upon it his own name and sold it to the plaintiff, who was a purchaser in good faith. Payment of the draft was refused on the ground that it was a forgery. The trial court sustained this view, and entered judgment for the defendant, which was affirmed.

It will be seen that the last cited case is different from the one at bar in that the drawee refused to pay, and the purchaser of the forged draft brought suit; in the instant case, the First National Bank of Gulfport, appellee here, indorsed the draft after the forged indorsement, thereby contracting that it was not forged (1 Daniel Neg. Inst., 4 Ed., 672) and the drawer bank of Florida paid it by the second draft; and while this case might be clear authority for the Florida bank against the appellee here, and for the appellant here if he had sued the Florida bank, yet this not a question of what other suits might have been brought by the appellant or appellee or the Florida bank; the Beattie case sustains the principles that we have asserted here, and contains a full discussion of the cases on forgery of negotiable paper by forged indorsement of the payee's name by another of the same name who had improperly come into possession of it, all of which clearly hold that the purchaser from such person acquires no title to the instrument, as we have contended. It is shown that the appellant made a demand upon the appellee, both in person and by bringing his suit, thus ratifying the collection of the drafts, and by the authorities first cited to that proposition, the appellee thereby became liable to the appellant for the proceeds of the draft, to wit, the two hundred and eleven dollars which it had collected from the Florida bank. As a further ground of sustaining the suit against the appellee, it seems clear that if appellee has collected money from the drawee of the draft, which the drawer could have refused payment of on the ground of the forgery by the negro Thomas (as

was done in the *Beattie case* in 66 Am. St., *supra*), why should the appellant be remitted to a suit against the Florida bank, in another jurisdiction, instead of against the appellee bank in his own jurisdiction which holds money it collected by appellant's draft (becoming his by the demand therefor on appellee), and to which it has no right under any theory of law or equity? If the appellee should be compelled to pay the money to appellant, it would be in no worse position than it was after paying that sum over to the forger, the negro Thomas, and it is certainly not entitled to remain in a better position, at least so far as the appellant is concerned. Had the appellant sued the Florida bank, that bank could have notified the appellee to defend—"vouched it to defend"—and upon its failure to do so, and a judgment had been rendered against the Florida bank in favor of appellant, the Florida bank could have sued the appellee here and obtained judgment, as held in *Bank v. Bank*, 94 Am. St. 637, 182 Mass. 230, 65 N. E. 24; the facts in that case are substantially like the case at bar, both on law and facts.

Bowers & Griffith, for appellee.

The appellee made and now makes several defenses to the demand and action, which, ought to protect it in this matter, and on the first of which we can do no better than to quote and adopt the language of one of the greatest, if not the very greatest, authorities on the subject. Morse on Banking, pp. 851-853: "The case of *Graves v. Bank* certainly carries the liability of the bank to an extreme, and it may be an excessive point. The rule is there laid down, that if a check be made payable to a person, and another person of precisely the same name, or initials, so far as these are written out in the check, comes wrongfully or accidentally into possession of same, indorses it, and obtains the money on it from the bank, still the bank is liable to make good the

amount to the drawer. The logical sequence which leads to this goal is clear enough. The drawer has ordered payment to be made to the order of one person, and it has been made to the order of another; consequently, payment has not been made according to the drawer's direction, and the bank is not discharged *pro tanto*. The indorsement is a forgery. This is plain reasoning. Yet it would seem that the bank ought to be protected in such a case. A reasonable limit should be set to its liability. It cannot be supposed to have such cognizance of the private affairs of each depositor as to know in favor of what individuals he is going to draw his several checks. This is clearly impossible. The depositor orders payment to be made to one A. B. An A. B. presents the order and endorses it; the bank knows him to be A. B., or obliges him to prove himself A. B., and then pays him. Without the gift of divination, what more can they do? They have used all the means of identification which the drawer has placed at their disposal, and if these have only led them into error, it is certainly rather his fault than theirs. He gives them nothing but a name to guide them in selecting the payee from the various members of the community; they do all that can be done with this sole means of distinction. If the name is not enough, but should have been supplemented with descriptive language, setting forth the true payee's profession, abode, place of business, etc., the drawer should have known this necessity and provided for it. If he depends upon the name alone, should he not be held to take the risk of its sufficiency as a sole means of identification? He had some degree of personal knowledge of the payee, and the bank very probably had not one particle. It does its best with the light it has. The drawer has not done his best by the light he had. Clearly justice demands that the drawer should suffer in case of error induced by such a state of affairs. But though the propriety of the ruling may be

criticised, it must be admitted that it lays down the only adjudicated law in the premises, except a remark made in an old case in New Hampshire. The only English authority is to the same effect. It is to be found in the case of *Mead v. Young*, which was cited as an authority in *Graves v. Am. Bank*, and which appears fully to support that decision. It may be worth noticing, that in the American case Judge Roosevelt dissented. The technical rule of law declaring the indorsement a forgery is too strong for the principles of justice.

A pension agent sent a check addressed to H. and payable to him, but to the wrong postoffice, whereby another person of the same name received the check, forged the indorsement, and got the money. H. recovered of the bank; it had accepted the check, and from that moment held the money for the true payee.

Where a bank pays to another whose name is pronounced like that of the payee, but differently spelled, whether it was negligent is a question of fact on all the circumstances.

This is the true question. It will not do to say the bank has not paid to the person to whom the drawer ordered payment, therefore it is liable; the question is, whose fault is it that a mistake has been made? The bank is only bound to the exercise of ordinary care in obeying the drawer's instructions; if it does this and loss follows, the depositor must bear it, just as if he had been doing the work himself."

MAYES, C. J., delivered the opinion of the court.

By agreement a jury was waived, and this case was tried by the judge on an agreed statement of facts. It is therefore unnecessary for us to set out at length any statement of the facts. The suit was instituted by J. S. Thomas against the bank for the purpose of recovering two hundred and eleven dollars. The agreed facts show that on and prior to the 23d day of October, 1909,

the appellant in this suit had on deposit in the First National Bank of De Funiak Springs, Fla., a credit balance of two hundred and eleven dollars. Appellant, being in Gulfport, wrote a letter from that point to the Florida bank requesting the bank to send the amount of his deposit to him at Gulfport, care of the general post-office delivery. In accordance with this instruction, the Florida bank sent a draft for the amount on a New York bank, payable to the order of appellant, J. S. Thomas; the Florida bank addressing the letter containing the draft to J. S. Thomas, Gulfport, Miss., care general delivery. The appellant was a white man and there was living in Gulfport at that time a negro by the name of J. S. Thomas, and this negro also received his mail at Gulfport. When the letter containing the draft reached Gulfport, October 25, 1909, it seems that appellant was not then in Gulfport; but the negro J. S. Thomas called for his mail at the general delivery, and the postal authorities delivered the letter intended for appellant and containing the draft to the negro of the same name. The negro opened the letter, and, finding the draft in it, took it to the First National Bank of Gulfport and indorsed same "J. S. Thomas," representing that the check was his and that he was the true J. S. Thomas mentioned as payee. The negro was known to the officers of the Gulfport bank and was a depositor in same. When the draft was indorsed to the bank by the negro, the bank paid the money to the negro J. S. Thomas. Subsequently, the Gulfport bank discovered some little mistake in the protectograph stamping of the draft, which mistake was made by the Florida bank when it issued the draft. The Gulfport bank returned the draft by mail to the Florida bank, calling their attention to the error, and requesting the Florida bank to send another draft in its place. The Florida bank merely retained the original draft and in the place of same sent another one for the same amount, but this time made it payable to the

Gulfport bank; the former draft having been already indorsed to the Gulfport bank by the negro, J. S. Thomas. The draft was finally paid to the Gulfport bank when it was presented for payment in New York. The Gulfport bank had no knowledge of the fact that the negro did not own this draft. Appellant, J. S. Thomas, the white man, subsequently learned from the Florida bank that the Gulfport bank had collected the two hundred and eleven dollars, and when he received this information he went to the Gulfport bank and claimed the draft and the proceeds thereof, demanding that the Gulfport bank pay the same. J. S. Thomas, the real owner of the draft, notified the Gulfport bank that the indorsement was a forgery. The Gulfport bank refused to reimburse the true owner. The negro, J. S. Thomas, in the meantime had left for parts unknown. In other words, the facts of this case conclusively show that the appellant was the owner of the draft, and that the negro who presented it had no interest in it, and had forged the indorsement of the true owner and collected the proceeds from same. Some other facts are agreed to, but we do not think they are important in the consideration of this case. The question in this case is simply this: Where there are two people of the same name, and a check, by accident, reaches the hands of the wrong person, and the person wrongfully obtaining the check indorses his name on same and receives the proceeds from an innocent third party, is such an indorsement a forgery, and is the innocent party protected as against the true owner? The trial court held that it was not such a forgery as would fasten any liability on the bank, and from this judgment this appeal is taken.

There seems to be little dissent in the authorities; almost, if not quite all, the authorities holding that under such circumstances the party paying the check to the one forging the indorsement is not protected. Under such circumstances, it is nothing but a forgery. The

true owner of the check is not placed beyond the protection of the law because some unscrupulous person of the same name lives in the same town with him. The true owner has never parted with his title, and his property is not to be taken away from him without his consent merely because the check happens to fall into the hands of another of the same name. Banks taking checks must know the true parties claiming to own them—in fact, who do own them—and they act at their peril. Where there are two or more persons of the same name, it cannot be anticipated that one of them will commit a crime and forge the name of the other to an instrument which may have accidentally come into his hands. The true owner of the check was guilty of no sort of neglect which would operate as an estoppel on him. He had a right to have his mail sent to him at the general delivery at Gulfport.

In the case of *Beattie v. National Bank of Illinois*, 174 Ill. 571, 51 N. E. 602, 43 L. R. A. 654, 66 Am. St. Rep. 318, the court holds that: "Where a bill is payable to the order of a person, and another person of the same name of the payee gets hold of it and indorses it to a party who takes it in good faith and for value, such party acquires no title to the bill. If the indorsement, so made by a person who is not the real payee but has the same name as the real payee, is made by such person with full knowledge that he is not the real payee, and with intent to perpetrate a fraud, his indorsement cannot be regarded otherwise than as a forgery." To the same effect are many cases cited in the opinion in the above case.

It is true that Mr. Morse, in his work on Banks and Banking, at page 851, states in his text that under such circumstances he does not think that the rule announced above is correct; but he admits in this same text that, "though the propriety of the rule may be criticised, it must be admitted that it lays down the only adjudicated

law in the premises, except a remark made in an old case in New Hampshire;" and he further says, "The only English authority is to the same effect." Mr. Morse's view is that "the technical rule of law declaring the indorsement under such circumstances a forgery is too strong for the principles of justice;" but he is much alone in this view. We prefer to follow what seems to be the settled authority upon this subject, not only because the authorities are that way, but because we differ from Mr. Morse and believe that the principles of justice announced by the decisions are more in accord with true principles of right than the view stated by Mr. Morse. It is difficult for us to understand by what principle of right a man should have his money or valuables taken from him because he has the misfortune, through no fault of his own, to have the same name as some other person in the same town. It is difficult for us to understand how the true owner of a draft may lose his property rights in same by reason of the fact that it has fallen into the hands of another person of the same name and that other person has forged an indorsement of his name to the instrument and obtained money for it when the true owner knew nothing about it.

In the *Beattie case*, in 174 Ill. 571, 51 N. E. 602, 43 L. R. A. 654, 66 Am. St. Rep. 318, *supra*, the court held that the true owner of a draft could recover its value where the person receiving it had the same name, but not the same middle initial. In other words, in the *Beattie case*, in 174 Ill. 571, 51 N. E. 602, 43 L. R. A. 654, 66 Am. St. Rep. 318, the draft sued upon was made payable to the order of one George A. Bent, when in truth it was intended for George P. Bent. The draft was mailed to George A. Bent, and George A. Bent received it and indorsed upon it his own name and sold it to a purchaser in good faith; but the court held, notwithstanding this, that the purchaser got no title, saying: "It is true that the real and intended payee of the draft was named

George P. Bent; but the fact that the name of the real owner and the name of the fraudulent possessor of the draft differed, so far as the middle letter of the name is concerned, does not make the case other than a case where the real name of the payee and the name of the assumed payee are the same. This is so because the law does not regard the middle initial as a part of a person's name, but only recognizes one Christian name of a party."

It is readily seen that the above case is a stronger case than this one because there was a difference in the name; that is, a difference in the initial. But in this case there was not such a difference, but the name was identical.

The case is reversed, and judgment here for appellant.
Reversed.

McLEAN, J. (specially concurring).

Whenever a bank pays a check drawn upon it, or upon any other bank, it does so at its peril; it is the duty of the bank to know that it is paying the money to the right party, and if the party presenting the check for payment is not the party, he is necessarily guilty of forgery in presenting the check with the name of the wrong party having been indorsed thereon by him. The fact that both parties have the same name does not, and cannot, in the very nature of things, alter the question. The fact that one writes his own name across the check, and knowing that the check is payable to another party, is as guilty of forgery as if he had personated another person, and had forged the name of the other person—in truth and in fact, when he does this he is personating another person. The bank must look alone to the party presenting the check for a good title. Any other doctrine would result in a party losing his property, without any fault on his part. The rule is well settled that

an indorser guarantees the genuineness of all prior indorsements.

It is an elementary principle that, when one or two equally innocent persons must suffer, he, by whose fault or neglect the loss is caused, must bear the burden. Suppose the check in this case had been made payable to Bill Smith, and that the negro named Thomas had written the name Bill Smith in blank across the back of the check and presented the check for payment, at the same time stating to the appellee that Smith had indorsed the check, could not in that case Bill Smith, the true owner of the check, have recovered his money? We see no difference in principle between such a case and the instant one. The difficulty with appellee is in confusing the real owner of the check with a party who bears the name of the real owner—it fails to distinguish between a name and the person.

SMITH, J. (dissenting).

I regret that I am unable to concur in the conclusion reached by my brethren. My views will be found expressed in 2 Morse on Banks & Banking (4 Ed.), p. 851, better than I can do so myself.

Suggestion of error filed and overruled.

C. B. FOX v. LEE BAGGETT.

[58 South. 481.]

1. SALES. *Warranty. Waiver of breach. Evidence. Necessity of objection.*

Where a buyer purchased a certain amount of cotton seed cake to be delivered to him at a certain point, quantity and quality being guaranteed by the seller, at destination and the buyer paid for more cotton seed cake than he received, he was entitled to collect from the seller the excess so paid.

2. SAME.

In such case it is immaterial that the cotton seed cake which was shipped loose in cars, was sacked by the buyer before it was weighed or that it was removed before it was delivered to the buyer at destination, if it sufficiently appears that all of the cake which reached the destination was sacked and weighed by the buyer.

3. APPEAL AND ERROR. *Evidence. Necessity of objection.*

Where no objection was made to the introduction of evidence in the court below, error in its admission is waived.

APPEAL from the circuit court of Lafayette county.

HON. W. A. ROANE, Judge.

Suit by C. B. Fox against Lee Baggett. From a judgment for defendant, plaintiff appeals.

The appellant was plaintiff in the court below, and appellee was defendant. The declaration alleged that plaintiff purchased of defendant, one hundred and fifty tons of loose cotton seed cake at twenty-three dollars a ton of two thousand, two hundred and forty pounds, to be delivered at Shipperside Terminals, New Orleans, La., weights and quality guaranteed by seller at American destination." In accordance with this contract, three carloads of loose cake were shipped to plaintiff, and drafts forwarded with bill of lading attached, which

drafts were paid. It is alleged that these cars were billed to plaintiff and were stopped en route at sacking plants in city of New Orleans, where the contents of the cars were sacked and the cars resealed and sent to the Shipside Terminals. The contents of the cars were weighed after sacking, and there was a shortage of thirteen tons. Plaintiff sues to recover the value of this shortage. It is alleged that the sale and delivery was subject to the rules and regulations of the Interstate Cotton Seed Crushers' Association. One of the rules of the association is that the "certificates so taken and properly sworn to shall determine weight and in all cases where cake is sold, delivered, or weights guaranteed at destination, provided the shipment is not broken in transit." Appellee contends that the shipment was broken in transit by reason of being sacked, but appellant contends that contract allows inspection, and further that it provides that the cars shall be delivered at Shipside, and that "weights were guaranteed at American destination," which means Shipside, under the contract. It is further contended by appellant that, since the contract specifies delivery at Shipside Terminals, the defendant must deliver the amount contracted for at such destination. On motion of the defendant, evidence of the plaintiff was excluded, and a peremptory instruction given to find for the defendant. Plaintiff, in his depositions, quotes figures from accounts and memoranda kept by a clerk in his office, showing weights of cars and cake. And one Douglas, a public weigher, in his depositions also quotes figures from books and memoranda kept by an employee of his; but there was no objection at the time to this testimony.

Edgar Webtser, for appellant.

We contend, first: That the weight certificates, pages 11, 12 and 13, determine the actual weight of the contents of every car. Because by the rules and regula-

tions of the Cotton Seed Crushers' Association, such "certificates so taken and properly sworn to shall determine weight in all cases where cake is sold 'delivered' or 'weights guaranteed' at destination, provided the shipment is not broken in transit." Rule 8, Sec. 5, page 38 of this record. In this particular instance the contract specially stipulated that "weights guaranteed at American Destination," pages 7 and 28, which destination, under the contract, was Shipperside Terminals of the Illinois Central Railroad, New Orleans, La. That being true, such certificates determine the actual contents of the several cars. Counsel for appellee contend that these cars were broken in transit. However, we submit under a reasonable construction of the contract of sale, and the rule and regulations of the Cotton Seed Crushers' Association, which said regulations, together with all the customs of the port, incident thereto, were incorporated into the same, the shipment was not broken in transit.

Because (a), the contract "allows inspection," and the cars were to be delivered at Shipperside, pages 7 and 28. To allow inspection is to permit the seal of the car to be broken, the port inspector to go into and upon the contents of same, and to examine them and to take samples and sacks at random from the car. "Delivered Shipperside" signifies that the cars reached their destination when, and only when, they are switched alongside a ship at the wharf. The appellee, familiar with the customs of the port and the places of delivery, knew, or by the exercise of reasonable diligence ought to have known, that the cake was intended for export, and for that reason had to be sacked, either by hand at the place of delivery, or at some sacking plant, intervening. See answer to Xinter, No. 7 of C. B. Fox. There was no rule of the association governing the sacking and weighing of the cake, neither was there any stipulation in the contract, relative to the sacking and weighing, hence in

the absence of both, the custom of the port prevailed. See answer to Xinter interrogatory No. 9 of C. B. Fox, page 23. And had the custom of the port been disregarded the contents of the cars could not have been weighed, and would have placed the buyer at the mercy of the seller. Answer to Xinter interrogatory 11, page 24. Therefore, the contract contemplated a breaking of the seal, a sacking, and a weighing, and such having been done in accordance with the rules, customs and import of the contract, it did not constitute a breaking in transit, in the meaning and import of the rule *supra*.

Because (b), we have in the rules and regulations of the Cotton Seed Crushers' Association the definition of what is recognized to be a "breaking in transit." See General Rules, rule 13, Sec. 1, page 39, "All offers, sales or purchases of cotton seed products shall be understood, unless specified to the contrary, to be f. o. b. cars at the mill," . . . "loss or damage by accident or wreckage in transit to be at buyer's risk." From this rule, it is evident if a car is wrecked, damaged, derailed or destroyed by the act of God, or by the railroad company, and the contents disturbed thereby, then the car has been "broken in transit," and certificates taken of the remaining contents, if any would not and ought not to determine the amount billed out by the seller. Otherwise it is not considered broken in transit, and an inspection, sacking and weighing does not constitute such.

Appellant further contends that these cars at the time of sacking were not his, but that they were still in the custody of the railroad company, both they and their contents, and that the railroad company was the agent of Lee Baggett, and not the agent of C. B. Fox, rule 13, Sec. 1, provides "unless specified to the contrary," all sales, etc., "shall be understood to be f. o. b. cars at the mill," but in this particular contract, page 28, it was specified that the cars should be "delivered Shipside Illinois Central Railroads Terminals, New Orleans, La.,"

and consequently these cars were not delivered f. o. b. at the mill; and furthermore, the railroad company was the agent of Lee Baggett, and being the agent of him, any loss, damage or other accident affecting the contents of the cars before they reached Shiptside would be chargeable directly to the negligence of the railroad company, and cannot be urged as a defense to any action between C. B. Fox and Lee Baggett, lessee of the Carrollton oil mill. It is true that Mr. Fox in his deposition, answer to Xinter interrogatory No. 9, page 23, says that the cars were sacked by his instructions yet he also states that it was the custom of the port to so do. And this being the custom, and nowhere is it denied, his assuming authority to have the same sacked in accordance therewith, never absolved the railroad company from its duties to the shipper, and never terminated the relation of agency existing between Lee Baggett and the railroad company. Until the cars were rolled down to Shiptside, or Stuyvesant Docks, page 27,—their contents were under the care of the railroad company. Answer to Xinter interrogatory 20, page 26, and likewise subject to the orders of Lee Baggett.

Counsel for appellee will doubtless contend that appellant is seeking to hold appellee responsible for waste caused by the process of sacking. We contend that Mr. Fox's testimony, answer to Xinter interrogatory 17, pages 25 and 26, shows that at Harahan's sacking plant there was no waste or deduction of the original contents in this process, when he says, "I know that all meal and meal dust is gathered up, and put into sacks." Could language be more emphatic or expressive?

Upon a motion to exclude the testimony not only the facts expressly testified to but all inference necessarily and logically to be deduced therefrom are to be taken as true, against whom such motion is interposed. *Alexander v. Zeigler*, 84 Miss. 560; *Rolling v. Sauce Co.*, 53 So. 394.

Kimbrough & Slough, for appellee.

Was the evidence sufficient to warrant a recovery? Where is the proof that the three cars were billed out of Carrollton, Miss., on "false and fictitious" weights as alleged? Where is the proof that the certificates of weights of Priday and Douglass "represent the entire contents of the three above mentioned cars just as they left Carrollton, Miss.," as alleged in the declaration. The certificates on their face only undertake to show the weights of so many "sacks of oil cake," when the original shipment shows and the contract called for only "loose cake." Said certificate of weights also show that in two instances the sacks of oil cake so weighed were taken out of cars other than the original shipment, showing clearly that the shipment of two cars had unquestionably been tampered with and "broken in transit," and that the contents of all three shipments had been tampered with and passed through the hands of the sackers. Thos. Douglass of the firm of weighers whose certificates are relied on in this case confirms these facts in his deposition. See page 33, *et seq.*, and nowhere in his testimony is it stated that the entire contents of the three cars were represented in those certificates. We respectfully urge a careful reading of his testimony. He says "the weights therein are true and correct as per certificates issued," that his sales were correct on that day, that the weight certificates as rendered include every sack weighed in each car. He does not even say that every sack in the car was weighed in each instance when asked that specific question by appellant. See page 35.

These certificates of weight then are not to be taken as evidence for two reasons: On their face they do not represent the original shipments—the evidence shows the cars to have been "broken in transit," and under the rules involved by the contract they cannot be taken as true and determinative of the weights of the original shipments.

The contents of the two cars passing through the Harahan sacking plant by order and the instructions of appellant, were not weighed there. No testimony is adduced to show that all the contents of these two cars were sacked before being transferred to other cars, or that no waste was committed in the process. Likewise the third car, the contents of which were supposed to be sacked at the docks, was not weighed when sacked, although sacked by a public weigher, and we have the testimony of no one as to how that sacking was done, whether all the cake was sacked and whether no waste was committed. This broken link in the chain of evidence so necessary and important, without which the case could not be "made out" is undertaken to be supplied by appellant's testimony as general processes and customs, who speak of the general process of sacking cake, but not how this cake was sacked, and who justifies his failure to have the shipments weighed before they had passed through the hands of the sackers, on the ground that he was permitted to do this by virtue of a "custom of the port," which "processes" and customs are not anywhere shown to have been known to appellee, or to have been in contemplation of the parties to the contract.

Admitting in one breath that he ordered the sacking of the loose cake and had a right to do it according to the "custom of the port," in the same breath he declines responsibility for his acts, contends that the railroad company in permitting the sacking was acting as the agent for appellee, and if any loss resulted in weights through the negligence, incompetency or rascality of the sackers, the appellee must suffer the loss. We do not think this argument stands the light of reason.

There is no need for a proof of custom to interpret this contract. It provides its own basis of interpretation by specifying "According to the rules and regulations of the Interstate Cotton Seed Crushers' Associa-

tion.” The custom relied upon by appellant is not sufficiently proven; is neither certain, uniform or reasonable, and is certainly inequitable to the shipper. In the case of *Telegraph Co. v. Willis*, 93 Miss. 552, on page 552 we find this language in the opinion of the court and endorsed by the court: “usages and customs cannot be proved to contravene a rule of law, or to alter or contradict the express or implied terms of a contract free from ambiguity, or to make the legal rights or liabilities of the parties to a contract other than they are by the terms thereof. When the terms of a contract are clear, unambiguous and valid, they must prevail, and no evidence of custom can be permitted to change them.” Appellant accepted these shipments at their billed weights when he diverted them into the hands of the sackers without weighing them, and changing their identity without the knowledge or consent of appellee.

SMITH, J., delivered the opinion of the court.

If the evidence introduced by appellant in the court below be true, he paid for more cotton seed cake than he received, and, consequently, he is entitled to collect from appellee the excess so paid by him. It is immaterial that the cotton seed cake which was shipped loose in cars was sacked by appellant before it was weighed, and it is immaterial that it was removed from the cars in which it was originally shipped before it was delivered to appellant at Shipside, for it sufficiently appears that all of the cake which reached New Orleans was sacked and weighed by appellant.

It may be that some of the evidence contained in the two depositions introduced in the court below by appellant is hearsay, as to which we express no opinion, for the reason that, since no objection of any character to these depositions, or any portions thereof, was interposed in the court below by appellee, this defect, if such there is, in the evidence was waived. Had a seasonable

objection been interposed, the deposition of persons having actual knowledge of the matter could have been taken.

The court therefore erred in granting to appellee the peremptory instruction. *Reversed.*

MISSISSIPPI CENTRAL RAILROAD COMPANY v. I. S. PILLOWS.

[58 South. 483.]

1. **APPEAL AND ERROR.** *Objections to instructions. Applicability to issue. Evidence. Admissions. Nominal party.*

Where instructions, applicable to the evidence, are objected to because not applicable to the issue made by the pleadings, this objection should be made when the instructions are presented for them an immediate amendment of the pleadings can be had, and if not so made will not be considered in the supreme court on appeal.

2. **TRIAL.** *Instructions. Error cured by other instructions.*

In a suit against a common carrier for personal injury the omission from an instruction for plaintiff of the words "from the evidence," is cured by an instruction for defendant to the effect that the jury must be governed in their verdict by the preponderance of the evidence and by other instructions in which such words are used.

3. **EVIDENCE.** *Admission. Nominal party.*

In a suit by a minor by his father and next friend against a carrier for personal injuries, evidence by the defendant of what the father and next friend of plaintiff said as to obtaining a ticket was not admissible, where it was not shown that the son was present, the father being a mere nominal party to the suit.

APPEAL from the circuit court of Lincoln county.
HON. D. M. MILLER, Judge.

Suit by I. S. Pillows against the Mississippi Central Railroad Company. From a judgment for plaintiff, defendant appeals.

This suit was brought by the appellee, who was plaintiff in the court below, against the Mississippi Central Railroad Company, for injuries received by the appellee, who was a minor, at the hands of the porter of the appellant railroad company; the declaration alleging that plaintiff had bought a ticket from Wanilla to Silver Creek, and that when he boarded the train and became a passenger the porter on the train pushed him off while the train was running, and the train ran over his leg and cut it off. There was a jury and verdict for one thousand dollars, and the defendant appeals.

As originally drafted, the declaration alleged that, in boarding the train, the passengers crowded the plaintiff, and thus he was pushed from the platform. Afterwards, by permission of the court, the plaintiff amended his declaration so as to allege that the porter pushed him off. Plaintiff testifies that he bought a ticket and boarded the train just as it began to move away from the station, but after he got on the platform the porter gave him a shove, and he lost his balance and fell backward off the train, which ran over his leg and cut it off and otherwise bruised and injured him. The contention of the railroad company was that he did not buy a ticket and was not a passenger, but was a trespasser, and that the porter did not shove him off, but that he fell off, and the defendant introduced testimony to this effect. There was a sharp conflict in the testimony of the plaintiff and defendant. The ticket agent was introduced to show that the last ticket sold before the departure of the train inflicting the injury, between the points above named, was No. 2475, while the ticket produced by plaintiff at the trial was No. 2476. This evidence was brought out by witness Marero, as a part of his report to the superintendent and is as follows: “(Defendant offered

in evidence as Exhibit A, that part of the report which shows the number of the ticket sold upon that occasion. Counsel for plaintiff insist upon the entire report being offered. The court declined to compel that to be done, and plaintiff excepted.) As the accident occurred after the train had started, and all passengers had gotten on train, I took note of last ticket sold to Silver Creek, which was 2475, after No. 2 left. I did this in case party should send some one else to buy a ticket to Silver Creek and claim this as his ticket." The defendant offered to prove by Dr. Perry that Miles Pillows, father and next friend of the injured boy, had stated that he had contrived to purchase a ticket so that the claim might be made that the injured boy was a passenger. Miles Pillows himself was not a witness, and the court declined to permit proof of what he had said about purchasing the ticket.

Jeff Truly, for appellant.

Is it still the law in Mississippi that the plaintiff must make out his case by the preponderance of the evidence—even if the defendant be a railroad company?

Is it still the law in Mississippi that a plaintiff must sustain the material allegations of his declaration in order to obtain a verdict—even if the defendant be a railroad company?

Is it still the law in Mississippi that plaintiff can set up one state of facts in a declaration and sustain his case by proving another and different state of facts—even though the defendant be a railroad company?

Is it still the law in Mississippi that instructions to the jury must require them to believe "from the evidence" before they can return a verdict against a defendant—even though that defendant be a railroad company?

If any one of the above interrogatories which are respectfully propounded to the supreme court of the state

be answered in the affirmative, the inevitable result is the reversal of this case.

Is it still the law that the plaintiff must sustain by credible proof the material allegations of his declaration in order to maintain a recovery?

If so, this case must be reversed.

The facts set out in the original declaration were (1), that the plaintiff was a passenger and held a ticket, (2) that he was shoved off the platform by other passengers, (3) that this was by reason of the neglect and recklessness of the employees of the railroad company, and (4) that he was injured as a consequence of such neglect.

The amended declaration as shown by the motion to permit the amendment and as shown by the record simply changed the second averment contained in the declaration first filed so that when the case actually came before the court for trial the plaintiff's declaration contained these four (4) material allegations, each one of which it was necessary for him to prove by credible testimony; otherwise, under the accepted rule of law, he must fail inevitably of recovery. Those allegations were:

(1) That he was a passenger on the train, holding a ticket, entitling him to transportation.

(2) That he was shoved off by an employee of the railroad company.

(3) That this was through the neglect and recklessness of the employees.

(4) That he was injured thereby.

These were the issues that the railroad company was called on to defend or to controvert. These were the averments that the plaintiff was called on to prove. His success depended, under the pleadings in the case, upon each of the four allegations being sustained. He could not recover unless he had proven that the accident was caused by the negligence of the employees of

the defendant, nor unless he could prove that he was shoved off by some employee of the defendant, nor unless he could prove that he was a passenger and held a ticket, entitling him to carriage.

We wish specially to impress upon the court that this was a suit founded upon a breach of duty upon the part of the railroad company in failing to carry a passenger safely to his destination, as shown by the ticket which he alleged he had purchased and held. The declaration avers that "plaintiff did on said date purchase a ticket and pay therefor, and the said agent did on said day execute, issue and deliver to him a ticket and receive the money therefor, entitling him to a safe, orderly and comfortable passage from the said Wanilla to said Silver Creek, upon the said trains of said defendant, and that the said plaintiff became a passenger, entitled to the care, attention and services of the employees of said defendant. And further, "that the said employees did not perform their duty as aforesaid, and did not give him a comfortable, safe and convenient entrance to said train." So the claim for damages propounded by plaintiff was based upon the alleged violation of a duty by the defendant as a common carrier to one of its passengers.

These being the issues tendered by the declaration, the plaintiff could not recover a verdict by proving any other state of facts. Such a course would be a departure from the pleadings, and would be unwarranted and unallowable. It would scarcely be contended, we submit, that having alleged in his declaration that he was injured while a passenger on a train, a verdict would have been sustained in his behalf upon proof that he was struck by a running train or injured while on its tracks or any other of the familiar instances which will occur to the mind of the court. Yet, in this case, as we will undertake to show, the departure is no less radical and unauthorized.

The second instruction for the appellee, specially objected to and made a ground of exceptions in the motion for a new trial and in the assignment of error, is as follows: "The court instructs the jury that if they believe the porter recklessly and in total disregard of the plaintiff's position wilfully pushed him from the train while it was in motion, and because of this plaintiff's leg was cut off, then their verdict should be for the plaintiff regardless of the fact whether he was a passenger or trespasser or had a ticket or not."

We assert that this instruction was fatal error for many reasons. (1) It authorized a recovery without regard to whether the allegations of the declaration were sustained or not. It predicated recovery upon the sole fact of whether the porter had caused the accident. This instruction told the jury that if they believed the man was injured and that the negligence of the porter caused the injury that then the averments of the declaration might be thrown aside; the issues made by the pleadings might be ignored, and they should find for the plaintiff whether he had a ticket or not; whether he was a trespasser or not; thus allowing the plaintiff to recover not by proving the material allegations in his declaration, but by proving an entirely different state of facts. (2) This instruction is wrong again, we submit, because it singles out and accentuates two of the alleged facts and then comments upon the weight of the evidence in violation of our statute.

There was no doubt that the man had been injured; that fact was self-evident. The physical condition of the plaintiff demonstrated his injuries, so this instruction said to the jury, "if you believe this one fact—that is that the porter shoved the plaintiff off the train, you must find for the plaintiff," thus commenting directly upon the weight of evidence. In the face of this instruction it was vain for the defendant to argue to the jury that the whole case as shown by the proof was a con-

spiracy, deliberately concocted and contrived to filch money from the coffers of the railroad company. It was useless to say that the story about the ticket was as had been detailed by Miles Pillows to Dr. Perry, even had that testimony been admitted. It was useless to say that the records showed that the ticket which the plaintiff introduced in evidence was, in truth, purchased after the train had gone, and the man was hurt. It was useless to say that the plaintiff's story was discredited by the contradictions of Dr. Perry, Chisholm, Marero and Garrett. To all these the answer of the appellee was the second instruction given in its behalf. "If you believe the porter shoved the plaintiff off the train, you must find for the plaintiff."

(3) Nor was this the only vice in the instruction. It was useless to argue to the jury that the plaintiff had failed to make out his case by a preponderance of the evidence. It was useless to urge upon them that they should not believe disinterested witnesses in favor of a man whose interests were wrapped up in the recovery of a verdict, and whose story had been contradicted and impeached by the testimony of others. It was useless to insist that the record of the railroad company could not lie and could not have been falsified for this particular occasion, and that they showed that the ticket introduced in evidence had been sold after the man was injured and the train had gone.

To all this, the second instruction gave an answer. It said, if you believe that the porter shoved the plaintiff off the train, your verdict should be for the plaintiff whether he had a ticket or not, whether he was a trespasser or not. "If you believe," said the instruction. Not from the evidence; not from a preponderance of the proof; not because you believe the negro told the truth and the white people did not; not because you might believe the witnesses for the railroad were perjured or mistaken. "If you believe" from any reason,

from your whims, from your dislike of anybody connected with the railroad company, from your anticorporation proclivities, from your prejudiced partiality or friendship, from your bias, from any reason, if you believe for any reason except "from the evidence." The life-giving, law enforcing words, "from the evidence," were omitted, so that the jury having been told they might disregard the declaration of the plaintiff were further told that they might also disregard the proof in the case.

Turned adrift then without rudder, compass or known channel, having but one port to reach—or rather one result to arrive at; that is, to safely deliver a verdict against the railroad company.

If this court will follow what it has already said, and if, as we know is true, this appellant is entitled to the same rights as all other defendants in all other cases then the omission of the words "from the evidence," from this instruction must inevitably work a reversal of the case.

Said the supreme court of this state, speaking in the case of *Gordon v. State*, 49 So. 609, where an instruction in which the same vice appeared, was under review, "But worse than this it charges that they may find the defendant guilty if they simply believe so and so; that they are not required to believe from the evidence. It is impossible to affirm this case which is an exceedingly close one on its facts, in the face of an instruction so grossly erroneous."

The observation and criticisms of the supreme court in that case are strikingly applicable to the instructions and facts in this case. Here, too, the jury are told they may find the defendant guilty if they simply believe so and so. Here, too, they are not required to believe from the evidence. Sufficient, says the instruction, if you believe from whim or prejudice, personal impression or outside information. And in the instant case the in-

struction is more grossly erroneous, it commences by stating in effect that the jury might ignore the allegations of the declaration and find the defendant guilty even though no charge contained in the declaration had been sustained.

Likewise, the supreme court of Illinois in the case of *Ewing v. Runkle*, 20 Ill. 464, speaking of an instruction where the words "from the evidence" were omitted, and criticising it, says, "Juries should be permitted to believe nothing except that belief be occasioned by the evidence, and their minds should always be directed to that, and that only, as the ground of their belief."

Cassedy & Butler, for appellee.

The first contention in brief of appellants, is that the declaration as originally written was, that some of the passengers in getting off the train, shoved him off; this was prepared at the suggestion of a friend of plaintiff, and not from the statement of plaintiff, as the record will show. That after the plaintiff was seen, and his account of it obtained, permission of the court was asked to amend by changing the declaration so as to aver the facts. That the porter of the train shoved him off. Upon this allegation in the declaration, the parties went to trial, and no complaint was made that any wrong was done defendants by this amendment, as the case was continued at the first term after this amendment was allowed and made. The case was tried upon this issue, did the porter on the train shove him off? this was the pith of the case, and everything else were mere incidents to it.

It is contended by appellant that, "the plaintiff must sustain the material allegations of the declaration.

1st. That he was a passenger, on the train, holding a ticket entitling him to transportation, and,

2nd. That he was shoved off, by an employee of the railroad company;

3rd. That this was through the neglect and recklessness of the employees;

4th. That he was injured thereby.

We will take these claims in the order in which they are given.

First. There are many things in the declaration that it makes no difference about; for instance, he avers he is a citizen, and no one would contend that if it should turn out he was not a citizen, that the company would not owe him the same duty, as if he was. There was some evidence tending to show he did not have a ticket, but he testified he did, and proved it by witness, Bertha Collins, and produced the ticket, so we say this matter was for the jury.

Second. "That he was shoved off the train by an employee." This was really the question in the case, and if he was shoved off by an employee, it made no difference whether he had a ticket or not and this was proven to the satisfaction of the jury.

Third. "That this was through the neglect and recklessness of the employees." This was fully proven to the satisfaction of the jury.

Fourth. "That he was injured thereby." No one disputed this. It is contended by appellant that the second instruction for plaintiff according to the record, was wrong in leaving out the words "from the evidence." We contend that the mere omission of these words does not render the instruction bad. While this is the usual form, we do not think it necessary, for in the commencement of the trial the jury are asked if they knew anything about the case, and when they answer that they had heard of it they are specially asked if this would have any influence on them, and then they are specially sworn to try the case on the evidence introduced before them. What reason is there in requiring that the court, in every breath, must put in, "If you believe from the evidence?" They have already been in-

structed and sworn, that they will be governed solely by the evidence. However the court may think about this, we contend that every other instruction for plaintiff and every instruction for the defendant emphasized the fact that they must "believe from the evidence," and so thoroughly impressed this fact on the jury, that it would not be such error as would reverse the case. We contend specially that the first instruction of appellant cured any defect that might have been made in this report. It is as follows: "The court instructs the jury that they must be governed in their verdict by the preponderance of the testimony introduced before them." this peremptorily told them they must be governed by the testimony introduced before them. The only case referred to with reference to this error is *Gordon v. State*, 49 So. 609.

A reference to this case will show that it was a criminal case, a man on trial for murder, and while the court used the language quoted by appellant, yet the court condemned the instruction in other respects and merely made the comment in passing, and by reference to the case, it will be seen that the court would not have reversed the case on this alone.

We contend, however, that the error complained of, even if it was an error, is not a reversible error, for clearly the same result would have been reached. *Nichols v. Railroad Co.*, 83 Miss. 126. A judgment will not be reversed because of an erroneous instruction where the right result was reached. *Hardware Co. v. Heidelberg*, 91 Miss. 598. Where no other result than what was reached could possibly be proper on the testimony, trivial error in the instruction or otherwise is not ground for reversal. *Arky v. Cameron*, 92 Miss. 632. When it is clear that a correct result was reached by the trial court the supreme court will not reverse for a trivial and non-prejudicial error.

The giving of a bad instruction is no ground for setting aside a verdict where it is clearly right on the law

and the facts. *Wiggins v. McGimpsey*, 13 S. & M. 532; *Heads case*, 44 Miss. 731; *Evans case*, 44 Miss. 762; *Hanks v. Neal*, 44 Miss. 212; *Railroad Co. v. Whitfield*, 44 Miss. 466.

As to that part of the instruction that tells the jury that "if the porter recklessly and in total disregard of the plaintiff's position willfully pushed him from the train, while it was in motion and because of this, plaintiff's leg was cut off, then their verdict should be for the plaintiff, regardless of the fact whether he was a passenger or a trespasser, or had a ticket or not."

The only reason that the appellant claims that this ought not to have been given, is that this was not stated in the declaration. The attention of the court is called to the exception that was taken in the court below, which is presented in the motion for a new trial.

No exception was made as to this feature of the instruction. In fact at the time of giving this instruction, no exception was taken; if it had been done the instruction could have been amended, and if necessary the declaration could have been amended. The only objection to the instruction was made in the motion for a new trial on the ground that the instruction left out "if they believed from the evidence," and no objection was made that the latter part of the instruction was wrong because the matter set up in it was not in the declaration. See the motion for a new trial, page 111, which is as follows:

Sixth. "Because the court erred in giving the second instruction given the plaintiff, which is erroneous, because it omits the words "from the evidence," and permits the jury to assess damages and to find a verdict against the defendant, upon their belief alone, whether said belief grows out of, or is based upon the testimony introduced." This was all that was said with reference to this instruction, and there was nothing said about any of the instructions other than this. We contend the rule to be that he cannot raise the objection in this court

for the first time and especially when the only objection urged was that it was not alleged in the declaration. An opportunity should have been given to have amended the declaration, so as to have presented the question, and having failed to urge it at the time the court gave the instruction, he will not be heard for the first time here.

We contend that this instruction is right and properly propounded the law. The gravamen of the complaint is not whether he had a ticket or not, but that the porter shoved him off of the train while it was running. This instruction tells the jury that the porter willfully shoved him off of a moving train, and he was injured, thereby the company was liable, this is the law. In fact, it is admitted by the attorney for appellant and the only objection urged was, it was not in the declaration. We contend it was covered in the declaration, the question being did he wrongfully shove him off of the train? It is contended by appellant that the court erred in not permitting defendant to prove that the plaintiff was in the habit of jumping on and off the trains.

This made no difference for it would throw no light on the question as to whether the porter shoved him off of the train or not.

Argued orally by *J. T. Cassedy*, for appellee.

WHITFIELD, C.

A very earnest argument has been made to the effect that this case should be reversed on its facts. We have carefully read the record, and we are not prepared to yield to this suggestion. There is certainly sufficient testimony to uphold the verdict, if the jury believed the witnesses for the plaintiff, and the verdict establishes the fact that they did so believe.

The most serious contention of the appellant is that the second instruction for the plaintiff is erroneous.

That instruction is in the following words: "The court instructs the jury that if they believe the porter, recklessly and in total disregard of the plaintiff's position, willfully pushed him from the train, while it was in motion, and because of this the plaintiff's leg was cut off, then their verdict should be for the plaintiff, regardless of the fact whether he was a passenger or trespasser, or had a ticket or not."

It is insisted that the declaration, as originally framed, proceeded upon the theory that the railroad breached its duty in failing to carry a passenger safely to his destination as shown by the ticket which he alleged he had purchased, and that this instruction counts upon a different ground, to-wit, that the porter recklessly and willfully pushed the plaintiff from the train while it was in motion. As amended, the declaration did charge that the brakeman or flagman "shoved him with great force, and caused him to lose his balance, without fault on his part, and he fell from said train and under it, and thereby the injury was caused." If the amendment does not exactly allege the cause of action in the precise language of the instruction, it seems to us that it does substantially do so at least. The argument for appellant is that it did not substantially do so, and that consequently the jury, by this charge, were directed to base their verdict on a statement of facts different from the statement counted on in the declaration, even as amended, and that, since the allegations and the proof must correspond, this charge is fatally erroneous.

This objection to this instruction is made for the first time in this court, as appears from the sixth ground of the motion for a new trial, which is in the following words: "Because the court erred in giving the second instruction given the plaintiff, which is erroneous, because it omits the words, 'from the evidence,' and permits the jury to assess damages and to find a verdict against the defendant upon their belief alone, whether

said belief grows out of or is based upon the testimony introduced." It is thus made clear that this objection to this instruction was not made in the court below. If it had been made, of course the declaration could have been instantly amended to conform to the instruction. It cannot be allowed to make that sort of an objection so easily cured by amendment in the court below, in the supreme court, for the first time. This has been expressly decided in *Georgia Pacific Railway Company v. West*, 66 Miss. 310, 6 South. 207. Judge Campbell, speaking to this direct point, said for the court in that case: "We are not disposed to regard the objection to the instructions on the ground of want of applicability to the issue made by the pleadings, since if that had been urged in the court below, when the instructions were presented and found valid, an immediate amendment should have been ordered." This is not only a thoroughly sound rule of practice, but one absolutely necessary. This objection is therefore not tenable.

The other objection to this instruction, that the words "from the evidence" were left out after the word "believe," presents an error which we think is fully cured by the first instruction given for the defendant below. That instruction is in these words: "The court instructs the jury that they must be governed in their verdict by the preponderance of the testimony introduced before them." And every other instruction given for the plaintiff, and for the defendant, announces the same principle. The words "from the evidence" are expressly written into the fifth, sixth and seventh instructions for the defendant, and into the first instruction for the plaintiff. We do not think this error, therefore, a reversible one.

It appears from the record, page 108, that the report made by the witness Marero was introduced in evidence. Objection on that point is therefore inapplicable.

We do not think the court erred in excluding what Miles Pillows told Dr. Perry about getting a ticket.

Brief for appellant.[101 Miss.]

Miles Pillows was a nominal plaintiff merely, having no interest in the suit, and, besides, the statement was not made in the presence of the real plaintiff, the appellee.
Affirmed.

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated, the judgment is affirmed.

ED. ASH v. INTERNATIONAL HARVESTER Co.

[58 South. 529.]

SALES. *Remedies of buyer. Items of damage.*

Where a party buys an engine which is worthless, and rejects the same on that account he is entitled to recover of the seller all damages he has sustained by the seller's breach of contract including freight paid by him on the engine and a reasonable sum for storing and caring for the engine, unless he was directed by the seller not to store and care for it.

APPEAL from the circuit court of Wilkinson county.

HON. M. H. WILKINSON, Judge.

Suit by Ed. Ash against the International Harvester Company of America in which defendant filed a cross-action. From a judgment for defendant in the principal action and for plaintiff in the cross-action, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Shannon & Jones, for appellant.

In this case, it would be exceedingly difficult to find a material point upon which the judgment ought not to be reversed.

Plaintiff paid one hundred and forty-three dollars freight on an engine, shipped in his name by defendant, with which engine defendant came, and which defendant set up and tried to run; which failed to run and was abandoned by defendant on plaintiff's lot, without ever tendering it to him.

It sat there on plaintiff's lot, for about two years, under a shelter of tarpaulins furnished by plaintiff, who also greased and oiled it, and took such care of it as he could, but never used it nor tried to use it, nor was ever authorized to do so.

He proves the value of the storage, yet the court says he is entitled to nothing, neither for freight nor storage. We have to do some wild guessing to imagine how this conclusion was reached.

That defendant agreed to pay seventy-five cents per hundred weight, for freight, if it complied with its contract, shows clearly; that if plaintiff owed nothing on the engine, that seventy-five cents per hundred weight should have been allowed. But if plaintiff was not compelled to take the engine, and owed nothing on that, how on earth could he have been made to pay the freight? If he owned no interest in the engine, and never even had it tendered to him, how could he possibly be required to furnish two years storage gratis?

The conditions of the contract do say something about if the engine fails to work, the defendant refunds the purchase money and that ends it, but:

1st: The freight was a part of the purchase money under the contract.

2nd: That condition means only that no damages shall be recoverable.

3rd: The seventy-five cents per hundred weight was exigible.

4th: The contract was never performed by defendant, and no engine was ever accepted by, nor delivered to nor tendered to plaintiff.

5th: The contract is improperly in evidence.

It seems to us that it would be arrant nonsense to cite authorities in this case, and it is respectfully submitted.

Bramlett & Tucker, for appellee.

There was a written contract for the purchase of an engine, but the appellant sued appellee for freight and storage on the engine, and not upon the contract nor any breach thereof, which is all that appellee could possibly be liable for, for the contract did not require appellee to repay appellant any freight paid by him, but only to allow the amount of freight so paid and agreed as a credit on the contract price of the engine. Nor was there the semblance of liability upon appellee to pay appellant storage.

The appellee's pleadings set out the contract for the purchase of said engine, and on the trial of said case the original contract was introduced in evidence by appellee and marked exhibit "B." The contract clearly shows that the engine was purchased by Ash in Chicago and that he expressly agreed to pay freight on the engine from Chicago to Centerville, Miss. The appellant ignored the contract and in his declaration, claims one hundred and forty-three dollars freight paid and eight dollars and fifty cents per month for storage of the engine. Under the terms of the contract the engine was delivered to appellant, when delivered to the common carrier at Chicago for transportation to appellant at Centerville, Miss. Appellant paid the freight on the engine at Centerville, Miss., as agreed in the contract. See exhibit "A." The engine was tested and appellant was not satisfied with the test, but failed to comply with warranty written upon the back of contract and a part thereof and contract and warranty set out in appellee's pleadings.

The appellee has fairly met the issue in this case, and as there is no effort made by appellant to show that

appellee has failed to comply with the contract or that appellee has failed in the terms and conditions of the warranty, the court, therefore, is only called upon to decide the matter of delivery, and we submit that under the pleadings and the evidence it is shown that the engine was sold under a solemn written contract and warranty, and that the goods were delivered to the appellant as per said contract.

But should the court hold that appellee is liable for the freight, one hundred and forty-three dollars, paid by appellant, which we consider extremely improbable, still there was no liability for storage, which appellant well knew when he brought suit, then the court is without jurisdiction, and the case was properly decided for that reason if no other; and this case should be affirmed.

SMITH, J., delivered the opinion of the court.

Appellant purchased from appellee a gasoline engine for the sum of one thousand five hundred and seventy-five dollars. This engine was shipped from Chicago to appellant at Centerville, Miss., he paying the freight thereon, which amounted to one hundred and forty-three dollars. This engine seems to have been worthless. It could not be operated even by the employees of appellee who went to Centerville for that purpose, and consequently it was rejected by appellant. After its rejection, appellee made no disposition of it, but it remained, and still is, in appellant's custody. Desiring to collect the freight paid by him and also compensation for storing and caring for the engine, and appellee being a foreign corporation, appellant instituted this suit by attachment, the writ being levied upon the engine. Appellee denied liability, and filed with its plea a demand for judgment against appellant for the price of the engine. The court by peremptory instruction charged the jury to allow neither appellant nor appellee anything, and from a judgment in accordance therewith an appeal was

taken by the plaintiff in the court below; no appeal being taken by the defendant.

The peremptory instruction directing the jury not to allow appellant anything by his suit ought not to have been given. Appellee having broken its contract with appellant, he is entitled to recover from it all damages he has thereby sustained, included in which, of course, is the freight paid by him on the engine. He is also entitled to recover a reasonable sum for storing and caring for the engine, unless he was directed by appellant not to store and care for it.

Reversed and remanded.

L. A. WACHSTETTER v. H. W. BROWN.

[58 South. 530.]

EXCHANGE OF PROPERTY. *Right of action. Title. Replevin.*

Where plaintiff agreed with defendant to exchange an automobile for a launch but neither party delivered the article agreed to be exchanged, the contract was executory and plaintiff having no title to the launch could not recover in replevin for the same.

APPEAL from the circuit court of Hancock county.
HON. T. H. BARRETT, Judge.

Action of replevin by L. A. Wachstetter against H. W. Brown for a launch. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Bushing & Guice, for appellant.

The action of the court in granting a peremptory instruction to find for the appellee is manifestly erroneous, in view of the testimony. It is insisted by appellee

that the contract is within the statute of frauds and comes within Sec. 4779 of the Code of 1906, which is as follows:

Sales of personal property: A contract for the sale of any personal property, goods, wares, or merchandise, for the price of fifty dollars or upwards, shall not be allowed to be good and valid unless the buyer shall receive part of the personal property, goods, wares, and merchandise or shall actually pay or secure the purchase money or part thereof, or unless some note or memorandum, in writing, of the bargain be made and signed by the party to be charged by such contract, or his agent thereunto lawfully authorized.

Taking up the letters of appellee to the appellant, they are certainly sufficient in themselves to take the case out of the statute; the letter of October 6, 1910, marked Exhibit B in which the appellee states that he will ship launch by first schooner; the letter of October 20, 1910, in which appellee, claiming ownership of the automobile, requests appellant to sell the automobile for two hundred dollars and again promises to send the launch; the letter of November 21, 1910, in which the appellee again requests the appellant to sell the automobile, quoting from his own letter, "Hope you will make a deal with that man for me;" the letter of December 7, 1910, in which appellee again promises to send launch. In all but one of these letters he states, "your letter received," and of course the letters referred to and introduced at the trial make a part of the whole transaction. It is difficult to my mind to conceive of a case where the statute is more fully satisfied than in this one. Even a letter of acceptance of a verbal contract is sufficient. See 20 Cyc. 254-255. The case of *Bonds v. Lipton Co.*, 85 Miss. 209, 37 South. 805, is in many respects similar to this case. In the *Bonds v. Lipton* case the court speaking through Truly, J., said. "It is said the contract is void under the statute of frauds and the ci-

pher telegrams interpreted as above shown, do not sufficiently show a sale. But the inescapable reply to this contention is that the letters which passed between appellee J. C. Hood & Co. and C. A. Bonds, distinctly recognize the existence of a contract, and set forth with reasonable certainty the details of the transaction."

By the letters referred to above, the appellate has exercised jurisdiction over the automobile and treated it as his own property, giving orders stating the terms and manner of sale, etc.

McDonald & Marshall, for appellee.

We submit that the court's action in granting the instruction requested by the defendant is sustainable upon any one of the following grounds:

1. The contract was unenforceable under Sec. 4779 of the Mississippi Code of 1906, the statute of frauds.

2. Because the plaintiff sought to enforce by replevin an executory contract, which cannot be done under our system of jurisprudence.

3. Because plaintiff had no right, legally or morally, to insist upon replevying the launch in question without first delivering the defendant the automobile, or tendering the defendant its equivalent agreed upon in money.

We beg to argue briefly and concisely as possible in support of each of said reasons, taking them up in the order given.

The contract is clearly unenforceable under Sec. 4779 (statute of frauds) of the Mississippi Code of 1906. The provisions of this statute are too familiar to the court to warrant a setting out of its language. The transaction before the court is undoubtedly one coming within the contemplation of the statute. The letters exchanged between the parties, taken altogether, cannot be said to be a memorandum of the agreement. Could anyone, taking these letters in themselves, unassisted

by parol evidence, say what the agreement between the parties was? In short, these in no wise set out, with reasonable certainty, or, indeed, any certainty, the terms of the contract. And in considering this phase of the case we direct the court's attention to the fact that the supposed copy of a letter to defendant from plaintiff, of date October third, 1910, was entirely out of the consideration of the trial court for the reason that it had not been admitted in evidence, being properly excluded by the trial judge. A copy of this writing appears in "Exhibit A" in the record. It will be seen from the record that this purports to be a carbon copy of the original and it seems to have been offered in evidence by plaintiff upon two theories: first, that it was, in reality, an original, being a carbon copy or duplicate of the original; second, that notice had been given to produce the original and it was admissible as a copy or secondary evidence of the original. The court held that upon the first theory the writing could not be admitted in evidence for the reason that it was not a complete carbon copy, containing the signature of the original. It is familiar learning, we submit, that for a duplicate, or carbon copy, or a letter to be proven in evidence, it must be a duplicate of the entire instrument of writing, including the signature. Reynolds Trial Evidence and Cross Examination, page 133.

On the second theory the court, with perfect propriety and in accord with law, in our humble judgment, refused to admit the writing in evidence upon the ground that there was no testimony to the effect that the original was ever mailed. The record shows that the court gave the plaintiff ample opportunity to prove this, putting him upon notice that it was necessary, adopting this language from the record, "It is not shown what you did with the original, whether you threw it in the fire or what you did with it." And so the letter marked "Exhibit F," while we do not consider it material in

the decision of this case, was, we think, properly excluded from consideration by the trial court, because there was no evidence that the original was mailed. And so also in the case of the supposed copy of an original letter, excluded by the court, marked "Exhibit I" in the record. The court excluded this letter also for the very cogent reason that there was no notice given to produce the original. The principle of law that all of the letters taken together, that is the letters properly shown in evidence in the trial, must show, with reasonable certainty, the elements of the contract so that an inspection of the letters themselves would apprise one of the terms and circumstances of the contract, unassisted by parol evidence, is too elemental to justify burdening this brief with exhaustive citations of authority. 20 Cyc. 258; 29 Am. & Eng. Ency. Law (2 Ed.) 872 (d); *Frank v. Eltringham*, 65 Miss. 281; *Fisher v. Kuhn*, 54 Miss. 480. We have no quarrel with the law as given in the case of *Bond v. Lipton Co.*, 85 Miss. 209, cited by counsel for appellant. The cases are widely dissimilar in that the telegrams and letters in that case contained with absolute certainty the terms of sale, while, in the case at hand, the letters shown in evidence merely hinted at the existence of a contract, and in no manner set out its terms.

We submit, therefore, that the trial court, for this reason, committed no error in holding that the contract was unenforceable because of noncompliance with the statute of frauds and in accordingly granting defendant's requested peremptory instruction.

We respectfully insist that the trial court's action in granting defendant the requested peremptory instruction at the trial of this cause was clearly sustainable because an action of replevin, in our system of jurisprudence, was not maintainable upon the facts. The contract between the parties, had it been properly evidenced by writing to bring it beyond the statute of

frauds, was an executory contract, the title to the automobile and the launch to pass simultaneously to the respective parties upon delivery. It has been distinctly held by this court that replevin will not lie in Mississippi to enforce an executory contract of this nature. *Williams v. Sayers*, 79 Miss. 50.

In the case of *Berry v. Waterman*, 71 Miss. 479, Chief Justice Campbell said, in delivering the opinion of the court (page 499), "Conceding the validity of the contract between the parties, Waterman acquired but the right to claim a performance of the contract and to damages for nonperformance," the contract being executory. In 24 Am. & Eng. Ency. Law (2 Ed.), page 490, the following language is adopted in announcing the law: "In executory contracts or sale though the vendor may be liable on his contract for failure to deliver the property, the title to the property does not pass to the vendee so as to enable him to recover the possession by replevin," and there is no difference in the application of the law of contracts and procedure between an exchange of property and a sale. 11 Am. & Eng. Ency. Law 570. If the plaintiff felt aggrieved by the action of the defendant in not delivering to him the title and possession of the launch, plaintiff could, had the contract been enforceable under the statute of frauds, brought an action for damages against defendant.

We submit further that the trial court's action in granting defendant's peremptory instruction was clearly sustainable upon this last mentioned ground, an action of replevin not being proper remedy, under the laws of Mississippi in this case.

Cook, J., delivered the opinion of the court.

Appellant instituted an action of replevin against appellee for the recovery of a gasoline launch. On the trial, the jury were peremptorily instructed to find for the defendant.

L. A. Wachstetter was the owner of an automobile, and H. W. Brown the owner of a launch. Brown called at the home of Wachstetter, and, after an inspection of the automobile, offered to exchange the launch for the automobile. Wachstetter agreed, provided the launch was what Brown represented it to be; so it was agreed that Wachstetter was to go to Logtown, Miss., and there inspect the launch. He did go, arriving there on Sunday, and after an inspection was satisfied. It was then agreed that he should do some work on the automobile. In the meantime, Brown agreed to deliver the launch to a schooner, to be by the schooner towed to New Orleans, and there delivered to the appellant. The automobile was never delivered to Brown, and the launch was never delivered to Wachstetter.

We think the action of the court in peremptorily instructing the jury to find for the defendant was correct. Appellant never gained title to the launch, and therefore the action of replevin will not lie. This was an executory contract, and, while the appellant may have had a right to institute a suit for damages for the nonperformance of the contract, manifestly he had no right to institute replevin. *Williams v. Sayers*, 70 Miss. 50, 29 South. 995; *Berry v. Waterman*, 71 Miss. 497, 15 South. 234.

Affirmed.

G. F. PITTMAN v. STATE.

[58 South. 532.]

FALSE PRETENSE. *Fraud. Necessity for. Code of 1906, Sec. 1166.*

In order to constitute an offense under the Code of 1906, Sec. 1166, punishing every person who with intent to cheat shall designedly by any false token or writing or by any false pretense obtain from a person money etc. the false pretense relied upon for conviction must be accompanied by something more than a mere false statement of a fact whereby money or other valuable thing is obtained from another. Such false statement must also be accompanied by an intent to cheat and defraud the person from whom the money is obtained.

APPEAL from the circuit court of Forrest county.

HON. W. H. COOK, Judge.

G. F. Pittman was convicted of obtaining money under false pretense and appeals.

The facts are fully stated in the opinion of the court.

Currie & Currie, for appellant.

The intent of the appellant at the time of the making of the contract is the essence of this case. And before this verdict and judgment can be upheld, the testimony must be so strong on the point of intent to defraud as to dispel any reasonable doubt of such intent. 20 So. 629.

And such fraudulent intent cannot be inferred from mere proof of the representations. *State v. Myers*, 82 Mo. 558; *Trogdon v. Com.*, 31 Gratt. (Va.) 862.

Great latitude has been allowed in the reception of evidence bearing upon this point, or issue. *Trogdon v. Com.*, 31 Gratt. (Va.) 862; *McGee v. State*, 117 Ala. 229, 23 So. 797; *State v. Garriss*, 98 N. C. 733.

The foregoing authorities we think sufficient to establish our point, and to outline and indicate the latitude

allowed the defendant to introduce evidence and throw light on his original intention.

Jack Thompson, assistant attorney-general, for appellee.

Taking this record as a whole, this defendant has not been deprived of any of his rights by the learned circuit judge, but has had a fair and impartial trial. The facts in the case were passed upon by a jury, and after mature deliberation they were convinced beyond every reasonable doubt of the guilt of the defendant. In the absence of any error of law appearing in this record, I respectfully submit that this case should be affirmed.

MAYES, C. J., delivered the opinion of the court.

This indictment is under Sec. 1166 of the Code of 1906. The above statute provides that "every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, or valuable thing, upon conviction thereof, shall be punished by imprisonment in the penitentiary not exceeding three years, or in the county jail not exceeding one year, and by fine not exceeding three times the value of the money, property, or thing obtained."

In order to constitute an offense under the above section, the false pretense relied upon for conviction must be accompanied by something more than a mere false statement of a fact whereby money or other valuable thing is obtained from another. Such false statement must also be accompanied by an intent to cheat or defraud the person from whom the money, etc., is obtained. If money is obtained by reason of any false pretense unaccompanied by an intent to cheat or defraud, no crime is committed. When an indictment is found under the

above section, it is necessary to charge that the procuring of the money was with intent to cheat or defraud, and it is necessary to prove this allegation in the indictment, either by positive testimony or by circumstances.

A protracted and repeated examination of this record convinces us that the evidence wholly fails to show any intent on the part of appellant to cheat or defraud the Dantzler Lumber Company. The money obtained was used in furtherance of the purposes for which it was obtained. Pittman contracted to sell and deliver to the Dantzler Lumber Company certain pieces of hewn timber described in the contract. He failed to comply with this contract, but the money was used in an effort to comply with it, and not a fact in this case shows that it was obtained with any intent to cheat or defraud, either for himself or for another person. It may be true that Pittman misstated the facts as to his ownership of certain timber, but the facts utterly fail to show that it was done with any intent to defraud.

Reversed and remanded.

CITY OF JACKSON v. MRS. M. G. MUCKENFUSS.

[58 South. 533.]

1. MUNICIPAL CORPORATIONS. *Public improvements. Change of grade. Damages. Waiver.*

Where a property owner is required by a resolution of a municipality to construct a sidewalk in front of her property on a certain grade within twenty days, or show cause for her failure to do so, she did not by constructing such side walk waive her right to claim damages for being forced thereby to raise her lot and houses to conform to such grade and the fact that she waited for more than twenty days to construct such sidewalk makes no difference.

2. APPEAL AND ERROR. *Matters reviewable.*

Where in a suit for damages against a city, caused by a change of grade, the city secured the submission of the issue to the jury as to whether or not, plaintiff negligently constructed her house below an established grade, it could not complain on appeal that the jury found against it on this issue.

APPEAL from the circuit court of Hinds county.

HON. W. A. HENRY, Judge.

Suit by Mrs. M. G. Muckenfuss against the city of Jackson. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Powell & Thompson, for appellant.

While we have assigned other grounds our principal contentions are two:

1st. That the city by simply passing a resolution declaring the sidewalks necessary and by issuing the citation to the owner did not make itself liable for damages done by the owner herself in afterwards raising the grade and constructing the sidewalks.

2d. That the appellee by constructing her houses after the grade had been established did so at her own peril, for she placed the houses below the grade thus established.

In regard to the first position we say that this court has decided in the case of the *City of Jackson v. Williams*, 92 Miss. 301, "The right of a municipality to take or damage property is no greater nor less than any other corporation having the right of eminent domain."

Under our Constitution, Sec. 17, "Private property shall not be taken or damaged for public use except on due compensation being first made to the owner, or owners thereof in the manner to be prescribed by law."

Ch. 43 of the Mississippi Code of 1906 prescribes the manner in which parties desiring to exercise eminent domain shall proceed.

Sec. 1868 of said Code prescribes the rights of the applicant after judgment in eminent domain proceedings and provides that he can only go into possession after paying the amount assessed and all costs. In the case of *Williams v. Railroad Company*, 60 Miss. 689, which is affirmed in the case of *Railroad Company v. Ryan*, 64 Miss. 399, this court said that, "By a judgment confirming the condemnation of land for a railroad company and assessing damages, the rights of the parties had not become fixed absolutely. Unless the possession of the owner is disturbed he has no right to compel payment of the award."

In *Roads and Streets* by Elliott, Vol. 1, Sec. 595, we find that the owner can enjoin the city if damages are not assessed and tendered.

From these authorities the court will readily see that the city in simply declaring the sidewalks necessary and citing the owner to show cause, created no legal obligations upon the owner and certainly no compulsion to erect the walks herself and damage her own property, and it is only upon this theory that the owner, who did all the damage, can hope to recover from the city in this case.

Again we contend that if the owner of the property had any right to do the work herself at all, it should have been done by her within the twenty days as fixed by Sec. 3413 of the Code of 1906 after the order declaring the work necessary; in this case the work was not done as shown by the record until within two months after the passage of such resolution and citation served thereunder, and our contention is that after twenty days had elapsed as provided by the statute, she had no more right to construct a sidewalk than any stranger would have had, and cannot bind the city by her action after the lapse of said time.

We contend that the city by simply passing a resolution and serving a notice thereunder on the owner did

not irrevocably bind itself to construct a walk, nor legally compel the owner to construct the same *non constat*, but that the city after passing the resolution had determined to abandon the work and not construct the sidewalk at all and surely it had a right to do this under the decision cited above, even after it had gone into court and gotten a judgment condemning the property and making the award for damages.

The property owner may waive her right to make the improvements by not acting with sufficient promptness; see Elliott on Roads and Streets, Vol. 1, p. 868; and by not acting within the twenty days allowed by the statute she did waive such right in this case.

We contend that the appellee deprived the city of a valuable legal right by anticipating the city and constructing the walk herself when the city had the right to abandon the work and not construct it at all if it so desired, and thus depriving the city of an option guaranteed to it under the laws of the State.

It would be a dangerous precedent for this court to establish that the city by taking the first steps towards condemning the property could never back out, no matter how great the expense may be; that the owner would for all time thereafter have a right to construct the proposed improvement and hold the city up for such damages as might accrue by her own act in the face of the statute allowing only twenty days within which to do the work herself.

On our second proposition that all the houses on the lot in question were constructed after the grade had been established on the street we say:

That the damages cannot be recovered for injury to improvements put upon abutting property after the new grade has been established; see *Smith v. Kansas City*, 128 Mo. 23; *Dale v. City of St. Joseph*, 59 Mo. App. 566; *Keith v. Bingham*, 100 Mo. 300; 2 Abbott on Municipal Corporations, p. 1935; in this case the only dam-

age claimed is because the house had to be raised and the lot filled up, so we contend that appellee, having built her houses too low with reference to the grade before that time established, knew or ought to have known of the grade and have built her houses accordingly.

Longino & Ricketts, for appellee.

In the argument of this case in this court we are called upon to meet only the two contentions advanced by the appellant in the brief filed here in its behalf, namely:

(a) That the city by passing the sidewalk resolution and by issuing the citations thereon did not make itself liable for damages done "by the owner herself" in raising the grade and constructing the sidewalks.

(b) That the appellee in constructing her houses after the grade had been established for the street on which they faced, acted at her peril.

Of course this is clearly not a case for the application, except by way of rather remote analogy, of any of the principles or provisions of law governing the formal condemnation of property of private owners for public use, or governing the ascertaining in advance by such eminent domain proceedings of the amount of damage that would be done to the private owner by the carrying out of the intentions of the municipality. The decided cases in this state held the municipalities liable when they had, without resort to this method of ascertaining the amount of damage to private property, damaged private property by raising or lowering street or sidewalk grades. *City of Jackson v. Williams*, 92 Miss. 301; *City of Vicksburg v. Herman*, 72 Miss. 211.

The fact that the appellee applied in writing for a permit to have the sidewalk laid cannot be taken as estopping her from claiming damages in this suit. The city had directed her to lay the walk but it had also a year or two before passed an ordinance requiring every person who laid a sidewalk to apply for a permit to

have the work done and to state in such application the name of the contractor who was to do the work. For the laying of a walk without obtaining such a permit the same city ordinance (Revised Ordinances of the City of Jackson 1909, Sec. 5), provided a penalty of fine or imprisonment. It must be admitted, therefore, that if the appellee was directed to lay the sidewalk she was also directed to apply for a permit. Her having applied for it was simply the doing of what it was necessary for her to do in order to obey the orders of the municipality.

On the point of estoppel we respectfully refer the court to the following:

The fact that an abutter has done the work in front of his property in compliance with an order of the municipal authorities does not estop him from claiming compensation for a change of grade. (Quoted in substance). 1 Lewis on Eminent Domain, Sec. 343.

“The only question in this case is whether the plaintiffs waived their right to damages against the city by doing the grading themselves in respect of which the damages are claimed. The plaintiff owned and occupied the lots in front of which the grading was to be done. The ordinance altering the grade had been passed and the order requiring the plaintiffs to do it in conformity to the ordinance had been made and published. It was an order which the street commissioners were authorized to make. The performance of the work under these circumstances was the performance of a duty imposed by the charter; and how can such a performance be regarded as an abandonment of the claim of the parties to damages? The city authorities cannot pass ordinances and make orders directing acts to be done and when they are done avoid responsibility for their performance by averring that the ordinances and orders had no influence.” *Peach v. Milwaukee*, 18 Wis. 450.

We also respectfully refer to the following cases as in point on the question of estoppel: *Taylor v. City of*

Jackson, 83 Mo. App. 641; *Dunn v. Tarentum*, 23 Pa. Sup. Ct. 332; *Robinson v. City of Vicksburg*, 54 So. (Miss.) 858.

We quote from the opinion of the court in the *Robinson case*:

“Sec. 17 of the Constitution of 1890 provides that: “Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof,” etc. The petition signed by the appellant contained no express waiver. May a waiver be implied from a mere signing of the petition by him? Or may a waiver be implied by his signing the petition with the knowledge that in paving the city might find it necessary to change its grade? We think not. In our judgment such ought not to operate as an estoppel. A constitutional right may not be so lightly waived. There is nothing whatever in the petition, nor in the conduct of the appellant as disclosed by the record, which evidenced a purpose on his part to waive his constitutional right to claim damages to his property, caused by raising the grade of the street. Nor is there any evidence tending to show that the city, in passing the ordinance providing for paving the street, was led by the appellant to believe that he would not claim his right to damages for an injury thereby done him.” 54 So. 859.

But it is contended on behalf of the appellant that the appellee by delaying her application for a permit to lay the sidewalk until May 4, 1910, is debarred from any recovery in the present case. In reply to this it may be stated that the section of the Code of 1906 under which the city of Jackson was proceeding gave the appellee the right to have a clear twenty days' notice before the regular meeting of the board at which she, if she had been a resident of this city, might have appeared to “show cause.” It appears that the service on her was had on March 18th, and that the next meeting of

the board was on April 5th. The interval being less than twenty days, she was under no obligation to do the work by that meeting at any rate. And right here we get rid of one of the "two months of delay" mentioned in counsel's brief for appellant. The permit was actually applied for on May 4th, the day after the regular May meeting of the board of aldermen and the very first day that appellee, who had as it must be remembered no right to join in such protest, could have known that those resident property owners who had such right had not exercised it and that there was no possibility of the carrying out of the work being prevented by protest as provided for by law.

At the time she applied for the permit to do the work the ordinance or resolution adjudging a sidewalk to be necessary in front of her property was still in full force. No protest had been made and the time for protest was past. When the appellee applied for that permit the city of Jackson had wished to preserve for itself the "valuable legal right" and to prevent her from anticipating the city in the manner it might have done all of this by simply refusing the permit.

The question of the liability of a municipality for the damages resulting to private property from a change of grade of one of its streets has been frequently passed upon in this state. *City of Jackson v. Williams*, 92 Miss. 301; *City of Vicksburg v. Herman*, 72 Miss. 211; *Warren County v. Rand*, 40 So. 481 (Public Road); *Robinson v. City of Vicksburg*, 54 So. 858.

Directly in point on the question of the liability of the municipality for change of grade of a street are the following cases in which it was held that in an action by a property owner for injuries caused by filling streets in such manner as to cause established drains to become worthless, and water to set back upon adjacent property, the owner is entitled to damages for injury to the property. *City of Toledo v. Lewis*, 17 Ohio Cir. Ct. 588; *Cooper v. City of Scranton*, 21 Pa. Super. Ct. 17.

Interfering with the long established surface water-courses of raising the grade of streets so as to throw water back on abutting lots has been held sufficient to render the municipality liable for damages in states having constitutional provisions similar to our section 17. *Arndt v. Cullman*, 132 Ala. 540, 31 So. 478; *Morley v. Buchanan*, 124 Mich. 128; *Rice v. Flint*, 67 Mich. 401; *Avondale v. McFarland*, 101 Ala. 381, 13 So. 504.

Argued orally by *R. B. Ricketts*, for appellee.

SMITH, J., delivered the opinion of the court.

Appellant's board of aldermen having declared by resolution that the construction of a sidewalk adjacent to appellee's property was necessary, she was in due course served with a written notice directing her to construct this sidewalk within twenty days, or appear before this board, and show cause why appellant should not construct it at her expense. About two months thereafter appellee obtained from the city the necessary permit to construct this sidewalk, the plans and specifications therefor, and, complying with this resolution directing her so to do, constructed it. Her property being damaged by reason of the fact that the grade of the street, to which the sidewalk was conformed, had been raised by appellant, she filed her suit in the court below seeking the recovery thereof, and from a judgment in her favor this appeal is taken. After the sidewalk was constructed, it became necessary for appellee to raise the grade of her lot to conform thereto, which necessitated raising the houses situated thereon. Part of the damage claimed by her was the expense incurred in raising these houses. Appellant introduced evidence tending to show that the grade of the street along which this sidewalk was constructed, and to which it was necessarily made to conform, was established by appellant several years prior to the building of appellee's house.

It is contended by counsel for appellant that the judgment of the court below should be reversed for two reasons: First. That the city by simply passing a resolution declaring the sidewalks necessary and by issuing the citation to the owner did not make itself liable for damages done by the owner herself in afterwards raising the grade and constructing the sidewalk. Second. That the appellee by constructing her houses after the grade had been established did so at her own peril, for she placed the houses below the grade thus established.

With reference to the first proposition, it will be sufficient to say that in constructing the sidewalk appellee was simply obeying, as by law it was her duty so to do, the resolution declaring the construction thereof necessary, and consequently, having acted under compulsion, she did not waive her right to be compensated for any damage that might be thereby caused to her property. That the sidewalk was constructed after the expiration of the twenty days in which she was directed to either construct it, or appear before the appellant's board of aldermen and show cause why appellant should not construct it at her expense, is immaterial. The effect of non-action on her part until after the expiration of the twenty days was simply to give the city the right to build the sidewalk at her expense in the event she continued to delay building it herself.

The second question raised by counsel is not presented to us by this record, for the reason that at appellant's request the court below charged the jury as follows: "The court instructs the jury for the defendant that, if you believe from the evidence that there was a known and established grade on West and Hamilton streets before plaintiff built her houses on said streets and that the sidewalks in question were built on said grade, then it was negligence of plaintiff in not building her houses high enough to correspond with said grade, and in such

case she is not entitled to anything in the way of damages for afterwards raising her houses to the level of such established grade.” *Affirmed.*

MISS SUSIE RUSSELL GODFREY v. MERIDIAN LIGHT &
RAILWAY Co.

[58 South. 534.]

1. INSTRUCTIONS. *Damages. Carriers. Duty to receive passengers action for failure. Grounds of liability. Instructions cured by others.*

An instruction which assumes as true a controverted fact is erroneous.

2. DAMAGES. *Punitive. Grounds for imposing.*

Punitive damages are recoverable, not only for willful and intentional wrong, but for such gross and reckless negligence as is the equivalent of willful wrong in the eye of the law.

3. CARRIERS. *Duty to receive passengers. Action for failure. Instructions.*

In an action against a street car company for damages for failing to stop its car and admit plaintiff as a passenger, an instruction that “if plaintiff did not sustain any actual damages, and that the conductor of defendant’s servants was not insulting ‘and’ intentionally willful, even though negligent, then the jury should only award plaintiff nominal damages,” is erroneous for two reasons. First, because it required the jury to believe that defendant’s conduct was insulting, capricious and intentionally willful, the three adverbs should have been used in the alternative and not conjunctively, and second, the phrase “even though negligent” would have warranted the jury in believing that any degree of negligence, even gross negligence was intended.

4. CARRIERS. *Duty to receive passengers. Actions for failure. Instructions.*

If an intending passenger is at a proper place and in time to catch an approaching street car and could have been seen by the

servants of the company in charge of such car by the exercise of due care, then a failure to see such passenger and to stop and take her up is negligence and renders the company liable for damages.

5. SAME.

In such case if the conduct of defendant servants was characterized by willful, intentional or reckless disregard of plaintiff's right, exemplary damages may be imposed.

6. INSTRUCTIONS CURED BY OTHERS.

Where an abstract proposition of law is announced by an instruction and the same or similar propositions of law are thereafter correctly set forth in other instructions in the cause, then if taking the instructions on both sides as a whole, the court can safely affirm that no harm has been done to either side, and that the right result has been reached, the verdict of the jury will not, in such cases be disturbed.

7. SAME.

But where the court undertakes to collect certain facts, and making a concrete application of the law to such facts, instructs the jury to bring in a stated verdict if they believe in their existence, and the facts therein stated will not legally sustain the verdict directed, such error cannot be cured by other instructions.

8. CARRIERS. *Duty to receive passengers. Admissibility of evidence.*

In an action against a carrier for failure to stop its car and receive a woman and child as passengers, evidence of the motorman as to seeing a woman and child waiting for the car and as to what was done by the conductor and motorman with respect thereto was admissible.

APPEAL from the circuit court of Lauderdale county.

HON. JOHN L. BUCKLEY, Judge.

Suit by Miss Susie Russell Godfrey against the Meridian Railway & Light Company. From a judgment for defendant plaintiff appeals.

The appellant brought suit against the appellee for the sum of five thousand dollars damages for the alleged failure of the defendant to stop its car and admit her as a passenger at a street crossing in the city of Meridian.

The declaration alleges that plaintiff went to a corner in the business section of the city for the purpose of taking a car, and signaled for it to stop; that the signal was seen and understood by the motorman, but that he made no effort to stop the car until it had passed by plaintiff, finally stopping about fifty yards beyond her; that his failure to stop was willful and grossly negligent; that, when the car stopped, the conductor on the rear of the car looked back and saw that plaintiff wished to board the car; that without giving her time to reach it, or offer to back the car to the crossing where she stood with her baby, eighteen months old, the conductor willfully, negligently, and insultingly, knowing that plaintiff desired to become a passenger, signaled the motorman to go ahead, and left the plaintiff standing at the corner; that, by reason of the gross negligence and willful wrong done plaintiff by defendant, she was compelled to walk a great distance, carrying her child, suffering physical pain and mental anguish, to her damage, etc., and further, that because of the insults and humiliations heaped upon her by the servant of the defendant she is entitled to damages.

The case was submitted to a jury under instructions of the court, and resulted in a verdict for defendant, from which comes this appeal.

C. D. Christian and Green & Green, for appellant, filed an elaborate brief covering all points decided in the case but too long for publication.

Baskin & Wilbourn, for appellee, filed an extended brief fully covering the case but too long for publication.

WHITFIELD, C.

The sixth instruction given for the defendant is fatally erroneous, for two reasons: First, it assumes what was certainly in controversy that Freeman and Chatham

were the motorman and conductor on this particular street car; and, secondly, it took entirely from the consideration of the jury the question of whether the defendant was guilty of gross negligence. Punitive damages are recoverable, not only for willful and intentional wrong, but for such gross and reckless negligence as is the equivalent of willful wrong in the eye of the law. This is not the law. If this charge were correct, then it would follow that, although the jury might have believed that Mrs. Godfrey was in the place for embarkation on the car at the time stated by her, they would, nevertheless, find for the defendant, if only they further believed that the motorman and conductor did not see Mrs. Godfrey. They might not have seen her, and yet been guilty of gross negligence in not seeing her.

The sixth instruction is as follows: "Unless the plaintiff has shown by a preponderance of the testimony that Freeman and Chatham willfully refused to stop at a time and place when plaintiff was entitled to board the car then plaintiff is not entitled to recover punitive or exemplary damages against defendant; that punitive or exemplary damages are what is called in law smart money, or vindictive damages to be given in cases when those against whom they are inflicted have been guilty of willfully and knowingly wronging the party or parties claiming said damages."

The fourth instruction given for the defendant is as follows: "The court instructs the jury that the burden of proof is on plaintiff to show by a preponderance of the evidence that defendant's servants negligently omitted to stop the car and take her on as a passenger before plaintiff is entitled to recover at all; and, further, that, in the event the jury should believe from the evidence that defendant's servants did negligently omit to stop the car and accept plaintiff as a passenger, the burden is also on plaintiff to show by a preponderance of the testimony that she sustained actual damages and the

amount thereof with reasonable certainty before she can recover any actual damages, and, if the jury believe from the evidence that plaintiff did not sustain any actual damages, and that the conduct of defendant's servants was not insulting, and intentionally willful even though negligent, then the jury should only award plaintiff nominal damages." The last clause of this instruction, which tells the jury that if they believe from the evidence that plaintiff did not sustain any actual damages, and that the conduct of the defendant's servants was not insulting, capricious, and intentionally willful, even though negligent, then the jury should award plaintiff only nominal damages, is objectionable for two reasons: First. Because it required the jury to believe that the defendant's conduct was insulting, capricious, and intentionally willful. The three adverbs should have been used in the alternative, and not conjunctively. Second. The phrase, "even though negligent," would have warranted the jury in believing that any degree of negligence, even gross negligence, was intended. Gross negligence is negligence, but it is negligence to the N'th power.

The second instruction for the defendant is also erroneous, because it omits liability growing out of gross negligence. The instruction was calculated to make the jury believe that they might find for the defendant simply because the motorman and conductor did not, as a fact, actually see the plaintiff. The servants of the defendant company were required to use due care to see her, and if, by the exercise of due care, they would have seen her, the defendant would be liable. The instruction ignored the right of recovery growing out of gross negligence. The second instruction given for defendant is as follows: "If the jury believe from the evidence in this case that the conductor and motorman did not see plaintiff, and did not intentionally capriciously decline to stop the car and let her take passage thereon, the

jury should not award any punitive or exemplary damages against the defendant." The third instruction for the defendant is also fatally erroneous, which is as follows: "The court charges the jury that if they believe from the testimony that Freeman and Chatham did not observe that plaintiff desired or wanted to board defendant's car at the corner of Thirteenth street and Twenty-fourth avenue, and failed to stop and take her on for the reason above stated, then the verdict of the jury should be, 'We, the jury, find for the defendant.' " The court here attempts to make a concrete application of the law to the facts of the case, and directs the jury to find a verdict for the defendant if they believe the facts stated in the instruction. The facts set out in the instruction are that, if the jury believe Freeman and Chatham did not observe that plaintiff desired to board defendant's car and failed to stop and take her on for that reason, to wit, that they did not actually see her, they should find for the defendant. We have already pointed out that this is fatally incorrect. If the conductor and motorman failed to see her through the want of ordinary care, the company would certainly be liable. Liability would follow from a failure to see her, if by the use of due care she would have been seen, just as clearly as from the fact, if it were so, that they did not see her at all. The jury might have believed that Mrs. Godfrey was at a proper place, and in abundant time to catch the car, and yet they were told that, if they did not simply see her, they should find for the defendant. If she might have been seen by the motorman and conductor by the use of ordinary care, the company was plainly liable for the violation of its general duty which it owes the public to see. *Wilson v. N. O. & N. E. R. R.*, 63 Miss. 352.

Harper v. State, 83 Miss., 402, 35 South. 572, announces the true rule, which is: "Where an abstract proposition of law is incorrectly announced by an in-

struction, and the same or similar propositions of law are thereafter correctly set forth in other instructions in the cause, then if, taking the instructions on both sides as a whole, the court can safely affirm that no harm has been done to either side, and that the right result has been reached, the verdict of the jury will not, in such cases, be disturbed. *Skates v. State*, 64 Miss. 644, 1 South. 843, 60 Am. Rep. 70.

But where, as in the instant case, the court undertakes to collate certain facts, and, making a concrete application of the law to such facts, instructs the jury to bring in a stated verdict if they believe in their existence, and the facts therein stated will not legally sustain the verdict directed; such error cannot be cured by other instructions; the reason for the difference being that in the first instance it is simply an erroneous statement of a legal principle, which may or may not mislead the jury, according to the varying circumstances of causes, but in the latter instance, where a verdict is directed to be based upon the facts stated in the instruction, other instructions embodying other and different statements of facts and authorizing verdicts to be predicated thereon do not modify the erroneous instruction, but simply conflict therewith. If, by an erroneous instruction, a jury be charged to convict if they believe certain facts to exist, and by another instruction the jury be told that they should acquit unless they believe that certain other facts also exist, these instructions do not modify, but contradict, each other. The one is not explanatory of the other, but in conflict therewith. In such a state of case the jury is left without any sure or certain guide to conduct them to the proper conclusion. *Hawthorne v. State*, 58 Miss. 778; *Collins v. State*, 71 Miss. 691, 15 South. 42; *Josephine v. State*, 39 Miss. 617; *Owens v. State*, 80 Miss. 499, 32 South. 152.

This instruction was fatally erroneous, and not cured. We notice just one other matter. Testimony is set out

in the record as to the motorman seeing a woman and a child, which he supposed to be a girl, wanting to get aboard the car. A good deal of testimony was taken as to what the conductor and the motorman did with respect to this woman and her child, extending from page 33 to and including page 42 of the record. At the end of all this testimony, the court of its own motion excluded all this testimony, to which action of the court both the plaintiff and the defendant excepted. We think the jury were entitled to hear this testimony as to what was done by the motorman and the conductor, and what they saw with reference to this woman and her child. We are very much inclined, though expressing, of course, no positive opinion about it, to the view that the woman and child seen by the motorman were very likely the plaintiff in this case and her child. The motorman's idea that the child was a girl was, of course, pure guesswork, and his estimate of the age was of like little value. At any rate, it was for the jury to determine what his opinion as to both were worth, and to give to all this testimony as to what the conductor and the motorman saw and did, with respect to this woman and her child, just such weight as from the evidence they saw proper.

Reversed and remanded.

PER CURIAM. The above opinion is adopted as the opinion of the court, and, for the reasons therein indicated, the judgment is reversed, and the cause remanded.

Suggestion of error filed and overruled.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

MARCH TERM, 1912.

GREENWOOD GROCERY Co. v. W. B. & T. R. BENNETT.

[58 South. 482-598.]

1. ATTACHMENT. *Affidavit. Bond. Amendment. Code 1906, Secs. 136-775.*

Under Code of 1906, Sec. 136, providing that "in all cases where an attachment bond or affidavit may be defective in any respect or may be lost or destroyed, the plaintiff shall be allowed to file a new affidavit and bond which shall be in all respects as valid and binding as if given at the commencement of the suit," it was error, on motion to quash an affidavit which failed to state the name of the creditor or to describe the affiant as creditor, agent or attorney, to refuse to permit plaintiff to amend.

2. SAME.

Under Code of 1906, Secs. 136-775, authorizing amendments, it was error, on a motion to quash an attachment because the bond did not describe plaintiff as a corporation, to refuse to permit plaintiff to amend.

3. PLEADING. *Right to amend.*

Courts of law are organized for the purpose of trying causes on their merits, and only in exceptional cases should the trial court refuse to permit amendment of pleadings or proceedings.

APPEAL from the circuit court of Leflore county.

HON. P. C. CHAPMAN, Special Judge.

Suit by the Greenwood Grocery Company against W. B. & T. R. Bennett. From a judgment quashing the attachment plaintiff appeals.

The facts are fully stated in the opinion of the court.

M. B. Grace, for appellant.

The motion to quash the writs and bond should have been overruled, and the motion to allow plaintiff to amend same, or, substitute a new one in its place should have been sustained. Motion is the incorrect way to raise these questions; they should have been raised by exceptions to the affidavit and bond.

We submit, as a matter of right, justice and equity, the affidavit was subject to amendment under Sec. 775, Code 1906, and the many decisions of this and other courts. The policy of the law is, any and all pleading should be amended so as to bring the merits of the controversy between the parties squarely to trial on the facts. This court has held that the clerk should be allowed to sign, that is fix his signature to the affidavit; also, put his seal on same, when the motion to dismiss or quash is made and presented to the court. 62 Miss. 757. This is especially true, taking into consideration, the affidavit of M. B. Grace, attorney for the plaintiff, to the effect, that at the time the affidavit was drawn by M. B. Grace, and the affiant, E. M. Purcell, was in the act of catching a train for Chicago, and the affidavit was prepared very hurriedly, the omission was a mere inadvertence, and the attending circumstances were such that such an error might be made. See affidavit of M. B. Grace. It was prejudicial error for the court to sustain

the motion to quash and overrule the motion for leave to amend the affidavit and bond.

The appellate court will not, as a rule, disturb the rulings of the trial court, where the matter is within the mere discretion of the court, but, when the discretion of the court is abused the appellate court will right that wrong and reverse the ruling of the lower court. We submit there was no matter of discretion in this case, but the court took the bits in its own mouth, and ruled, apparently without regard for the decisions of this court, or any other court. This court has held an affidavit in attachment is not void because not signed by the affiant. *Redus v. Wofford*, 4 Smed. & M. 579.

Whether a paper, in form an affidavit, is really one, is not determinable by what either of the parties considered in reference to it, but by the inquiry, whether anything was done which could properly be construed as taking or administering an oath. *Carlisle v. Gunn*, 68 Miss. 243, 8 South. 743. This court has held in effect, the affidavit may be amended or a new one filed in its stead. *Griffin v. Mills*, 40 Miss. 611; *Green v. Boon*, 57 Miss. 617; *Bowles v. Dean*, 84 Miss. 376.

Pollard & Hamner, for appellants.

In considering the various defects claimed in the affidavit and bond, the whole record must be inspected. One portion may be permitted to help out the other, the bond may help out the affidavit, the affidavit may help out the bond, and the declaration may help out the writ. *Bishop v. Fennerty*, 46 Miss. 573. Both clearly show that the Greenwood Grocery Company was plaintiff and E. M. Purcell was secretary and treasurer. The affidavit was signed by E. M. Purcell, secretary and treasurer.

We take it that the court will reverse this cause for the very pronounced errors of the lower court in refusing to permit plaintiff to amend the attachment affida-

vit and bond as it had a perfect right to do under Code section 136. These amendments should be liberally allowed in cases of this nature and had they been permitted in this case the absurd conclusion reached would have been avoided and the general rule that the law shall be construed in the most liberal manner for the detection of fraud, the act of justice and benefit of creditors would have been established. Certainly the testimony bears unmistakable earmarks of the intention on the part of debtors to defraud the plaintiff and defeat it of its just claim. Had the amendments been allowed, as they should have been, the lien of the writ would not have been affected in any way. Code 1906, Sec. 136; *Griffings v. Mills*, 40 Miss. 611. The defendants would not have been prejudiced, the plaintiff would have been properly in court and defendant should have been required to file their plea in abatement in due form, or granted time in which to plead under a proper order of the court.

We take it that the court will reverse this case for the unquestionable errors of the lower court in refusing to allow the amendments by plaintiff.

Chapman & Williams, for appellee.

The point argued by associate counsel for appellant is that the court erred in quashing the affidavit and writ in this case, and in refusing to allow plaintiff to amend its affidavit and bond. The affidavit was absolutely void, and so Secs. 136 and 775 of the Code cannot rescue it. You cannot amend a void affidavit, because you have nothing to amend. The affidavit being void the writ was void, because issued without any authority whatever. An attachment proceeding is a special statutory proceeding, in derogation of the common law, and the statute must be strictly construed.

“Attachment being an extraordinary and summary remedy in derogation of the common law, the courts will

usually, in the absence of any statutory provision to the contrary, construe the statutes strictly in favor of those against whom the proceeding is employed, both as to the subject matter of the attachment and the method of enforcing the remedy, and will exact of plaintiff a strict compliance with all the statutory requirements." 4 Cyc. 400.

Since we have no statute in force at this time requiring that attachment laws shall be liberally construed in favor of attaching creditors, the authority cited in the last paragraph is the law of this case. When the cases cited by counsel for appellant were decided, Art. 44, page 382, Code 1857, was in force, which was as follows: "This act shall be construed in all courts of judicature, in the most liberal manner, for the detection of fraud, and the advancement of justice, and the benefit of creditors." This provision is not in the Code of 1871, reappears as Sec. 2476, Code 1880, and is omitted in the Codes of 1892 and 1906.

The affidavit is fatally defective in not stating that it was made by the creditor, or its agent or attorney, as required by Sec. 133, Code 1906.

The case of *Dudley v. Harvey*, 59 Miss. 34, was an attachment for rent by the landlord, but all that is there said applies with equal force to the facts of the case at bar. Judge Campbell said in that case: "The landlord must not only have a right to an attachment for rent, but he must proceed according to law in the employment of the summary and extraordinary remedy provided for the enforcement of his right. It is not enough that the conditions exist which entitle him to the attachment, but he must do what the law exacts as the foundation for its issuance. The mistake by which the wrong affidavit was made, and the attachment was therefore illegally issued in this case, is to be regretted, but it is chargeable to a failure to observe the provisions of the law conferring the right in certain states of cases to an

attachment for rent before it becomes due. The statute is plain, and the form of affidavit to be made in such case is prescribed (Sec. 1359, Code 1880), so that it would seem that the mistake could hardly occur in commencing the procedure."

So, here, the Code of 1906, sets out specifically the form of affidavit to be used, the form of the bond, and the form of the writ, and it is inconceivable how this proceeding could have been commenced on a void and illegal bond and affidavit, if appellant had used even the slightest diligence in following the plain forms laid down in the statute. The man who employs a highly dangerous machine is held to the highest degree of care in using it so as not to injure others; and the man who uses the extraordinary, harsh, summary and drastic remedy of attachment is held, under the law, to the very highest degree of care to commence and carry out his proceeding according to law.

In *Pate v. Shannon*, 69 Miss. 372, Judge Cooper, speaking for this court, said: "It is no more within the power of the court to permit an amendment to the affidavit upon which the validity of the writ depends than it would be to direct an amendment to a defective deed or power of attorney, relied on by a party plaintiff or defendant as a link in his chain of title. The making of the affidavit, as required by the statute, is a condition precedent to the issuance of the warrant; and if the condition is not performed, the warrant is illegal."

The process by attachment is an extraordinary one, and outside the general and natural courses of the law. It is a harsh remedy at best, and being purely statutory, the courts all agree that the processes marked out by the statute must be strictly pursued." *Drake v. Railroad Co.*, 69 Mich. 168, 13 Am. St. Rep. 382.

"The issuance of the writ is authorized by the statute upon certain conditions. These conditions must be strictly complied with in order to give the court juris-

diction to issue the writ. . . . The question of jurisdiction must always remain open to the debtor, and, if the officer had no jurisdiction, the whole proceeding was *coram non judice*." *Murphy v. Montandon*, 2 Idaho, 1048, 35 Am. St. Rep. 279.

"The remedy by attachment exists in this country by virtue of statutory enactment alone, and is in derogation of the common law. Moreover, it is summary in its effects, and is liable to be abused and used oppressively. For these reasons it is the prevailing rule that the statutory provisions upon which the right depends should be strictly construed, as to both the modes and the subjects of attachment." 3 Am. & Eng. Ency. of Law, 184.

"In most jurisdictions the statutes require that an affidavit shall be made before the writ may issue, and if the affidavit is not made, or if it is defective when it is made, the court will be without jurisdiction, and the attachment consequently void." 3 Am. & Eng. Ency. of Law, 206.

In the case of *Railroad Co. v. Lake*, 32 N. E. 590, the bond filed left the amount of the obligation blank, and the court held the attachment void, for lack of jurisdiction. The court said: "By the statute of Illinois, the filing of the attachment bond, as well as the filing of the affidavit is made an essential prerequisite to the granting of the writ. When a bond is required preliminarily, it is 'an essential prerequisite of the writ and a jurisdictional matter.' Wade, *Attachm.* 115. 'The giving of the bond in all essential particulars as the statute prescribes is in most cases held to be something more than a mere matter of form. Its omission is more than a mere irregularity. It is an essential prerequisite to the issuing of the writ, and where it is wanting in substantial conformity to the statute as to its obligation and conditions, it is no bond at all. It is one of the essential prerequisites of jurisdiction.' 1 Wade, *Attachm.*, Sec. 103."

So here the affidavit does not state that it is made by the creditor, his agent or attorney, as the statute requires, but so far as the affidavit shows, E. M. Purcell, the affiant, may be a mere interloper. And the affidavit is silent as to whom the debt alleged to be due is owing. It merely says that "W. B. Bennett & T. R. Bennett is justly indebted to . . . in the sum of three hundred forty-eight and 56/100 dollars." The affidavit is void, not merely defective. Nowhere does the affidavit show to whom the indebtedness is due.

In *Fargo v. Cutshaw*, 39 N. E. 532, the court refused to permit an amendment as to the name of the plaintiff, holding that, "There is a vast difference in the rules governing amendments to ordinary pleadings and in those applicable to attachments. In the former, as we have already said, the Code allows, and in fact requires, great liberality of construction. In attachment proceedings, however, the statute must be strictly and closely followed."

No bond in this case, signed by the attaching creditor, has been filed. The bond filed is signed "Greenwood Gro. Co." which is absolutely meaningless. The court is not called upon to read the minds of the parties who prepared the papers in this case, or to presume that these words mean the same thing as "Greenwood Grocery Company." Why should the letters "Gro." stand for Grocery? Why should they not as well stand for ground-hog, grotto, groundnut, ground, grouping, growing, or a hundred others? The well established rule is that the language of the pleader should be taken most strongly against him. It would not be contended that this would be good as a signature to a deed, or a promissory note. But counsel argue that the court would be inconsistent in affirming a judgment on this bond, void from the beginning, especially against E. M. Purcell. The answer to that contention is that E. M. Purcell has not appealed from the judgment rendered against him,

did not make a motion for a new trial, and took no steps to have the matter passed on by this court. Then he has no standing in court. As to appellant, it undertook to give bond, and would have been liable to defendants for the damages they sustained even if it had persuaded the clerk to issue the writ without pretending to file an attachment bond, and so the appellant has no right to complain.

“(Fla. 1869.) Where one sued out an attachment describing himself as the agent of plaintiffs, but failed to do so in the bond, so that it did not appear from any statement of his that he was the agent of plaintiffs, or their attorney, etc., it was held that the bond was fatally defective. *Work v. Titus*, 12 Fla. 628.” 5 Cent. Dig., Sec. 367 (d), p. 571. See also *Cornell v. Rulon*, 3 How. 54.

“An affidavit made under a statute authorizing plaintiff agent or attorney to make it must describe affiant as such agent or attorney.” 79 Am. Dec., 167.

Since the affidavit was void for the reason that it did not follow the statute, it follows that it was not amendable. *Carlisle v. Gunn*, 68 Miss. 243. And this case was decided in the face of Sec. 2476, Code 1880, in force at that time, requiring that the attachment laws should be liberally construed in favor of creditors.

The paper purporting to be a bond was no bond at all, because it was not signed. The letters, “Greenwood Gro. Co.” were meaningless, and insufficient to bind the plaintiff. If it is sought to be relied on as the bond of the agent, then it is void because there is no surety. So, the attachment writ having been issued without bond, it was void and properly quashed. *Ford v. Hurd*, 4 S. & M. 683.

The writ was also void, and should have been quashed, because it was not in the form prescribed by the statute. It was evidently the intention of Sec. 138, Code 1906, that the writ should recite the necessary jurisdictional facts

for the issuance of a valid writ, to wit: that affidavit had been made, and bond and security given by plaintiff, as required by statute. This is required by the statutes, and when we examine the writ, we find that the words, "and bond and security having been given according to statute," are stricken from the blank form furnished by the clerk, and the writ as issued contains no such recital. That is a substantial omission, and, we think, makes the writ void.

Cook, J., delivered the opinion of the court.

This action was begun by attachment. Printed forms for the affidavits and bonds were used. In filling out the attachment blanks, the name of the creditor was omitted in the affidavit, and the party making the affidavit was not described as creditor, agent, or attorney, but he did sign the affidavit "E. M. Purcell, secretary and treasurer." The bond was in due form and properly signed, except the Greenwood Grocery Company was not described as a corporation. The writ of attachment was in the language of the statute, and the declaration sets out the names of the parties to the suit, and was in proper form and complete in all details. Defendants made a motion to quash the affidavit, and writ of attachment, and assigned eighteen reasons why this should be done. Plaintiff asked leave to amend the attachment proceedings. The motion to quash was sustained, and the plaintiff was not permitted to amend. Thereupon a jury of inquiry to assess the damages of defendants was impaneled, over the protest of plaintiff in attachment, and the jury proceeded to render a verdict for defendants, assessing their damages at three hundred and forty dollars.

It is unnecessary to consider the numerous reasons assigned in the motion to quash the attachment; they were all predicated upon the theory that the attachment proceedings were absolutely void. If the proceedings were simply defective, the court should have permitted

the plaintiff below to amend the attachment proceedings. The last clause of Sec. 136, Code of 1906, reads as follows: And in all cases where an attachment bond or affidavit may be defective in any respect, or may be lost or destroyed, the plaintiff shall be allowed to file a new affidavit and bond, which shall be, in all respects, as valid and binding as if given at the commencement of the suit." See also Sec. 775, Code 1906.

It seems clear that the plaintiff should have been allowed to amend the attachment proceedings, or to have filed a new bond and affidavit. An amendment should have been allowed to all of the defects which we have not mentioned in the statement of the case.

Courts of law are organized for the purpose of trying causes upon their merits, and only in exceptional cases should the trial court refuse to permit amendments of pleadings or proceedings. *Bishop v. Fennerty*, 46 Miss. 570. *Reversed and remanded.*

On suggestion of error, Judge SAM COOK delivered the opinion of the court:

We have carefully considered the suggestion of error filed by appellee, and can find no reason why we should not adhere to our former decision.

The trial court erred in quashing the attachment writ and proceedings, and, these being the initial steps in the institution of the original suit, we did not deem it necessary to pursue the investigation further. As we understand the declaration, judgment might be rendered against both defendants, or against one and not the other, and, if this be true, an election was not necessary until after all proof was in. Indeed, it is the better practice to await the evidence before requiring an election. If the position of the appellee is sound, a demurrer should have been interposed.

We do not think the authorities cited in support of the suggestion of error have any application here, and the suggestion of error is overruled.

EDGAR BRITTON v. STATE.

[58 South. 530.]

1. INTOXICATING LIQUORS. *Change of statute. Increase of penalty. Right to object. Prosecution. Code 1906, Sec. 1746. Laws 1908, Ch. 115. Laws of 1912, Ch. 214.*

Sec. 1746 of the Code of 1906, as amended by Ch. 115 of the Laws of 1908, in regard to the unlawful sale of liquors was not repealed by Ch. 214 of the Laws of 1912, but was only amended so as to impose a more severe penalty for a second and third conviction.

2. CRIMINAL LAW. *Change of statute. Increase of penalty. Right to object.*

Where pending the prosecution of accused the law is changed so as to provide a more severe penalty for a second or third violation, he cannot complain where he is being prosecuted for a first violation.

3. INDICTMENT. *Penalty. Successive offenses.*

No person can be punished for a second or third violation if a severer punishment is to be imposed unless the indictment or affidavit so charge.

4. SAME.

If the indictment does not charge that the offense is a second or third offense, the court will presume it to be a first offense always and inflict punishment accordingly.

5. CRIMINAL LAW. *Change of statute. Prosecution. Code 1906, Sec. 1573.*

Under Sec. 1573, Code of 1906, so providing any crime committed prior to a change in a law is prosecuted under the law as it stood before the change was made.

APPEAL from the circuit court of Forrest county.

HON. PAUL B. JOHNSON, Judge.

Edgar Britton was convicted of unlawful retailing and appeals.

The facts are fully stated in the opinion of the court.

Currie & Currie, for appellant.

No brief found in the record.

MAYES, C. J., delivered the opinion of the court.

At the November term of the circuit court of Forrest county, 1911, Edgar Britton was convicted of selling intoxicating liquors. The prosecution of Britton for this offense was first begun before a justice of the peace some time in March, 1911, by affidavit which charged that appellant "unlawfully and willfully sold intoxicating liquors" in violation of the laws of the state.

After appellant was convicted in the justice court, an appeal was prosecuted to the November term of the circuit court, and appellant was again convicted on this affidavit and given a sentence of two hundred and fifty dollars and ninety days in jail. The above sentence is in accord with the punishment provided by Sec. 1746, Code 1906, as amended by Ch. 115, Laws of 1908, for the offense charged against appellant, and Ch. 214 of the Laws of 1912, amending Sec. 1746 of the Laws of 1908, did not make any change in the punishment prescribed for the offense charged against appellant. From the conviction in the circuit court, an appeal was prosecuted to this court. When the case reached this court on appeal, this court dismissed it for want of prosecution, as there was neither assignment of error nor brief filed in the case.

The record appears to have been filed in this court on February 10, 1912. The order of dismissal was made on March 18, 1912. On April 4, 1912, a suggestion of error was filed in which it is contended that the court erred in dismissing the case and leaving appellant to pay the penalty imposed by the trial court, for the reason that on March 9, 1912, the legislature repealed the law under which appellant was convicted, and thus terminated the right to punish for this crime, which was committed before the repeal of the law under which he was prose-

cuted. It is also claimed that the new law changed and made more severe the penalty for a violation of the liquor laws, and is therefore an *ex post facto* law as regards this appellant.

Sec. 1746, Code 1906, as amended by Ch. 115 of the Laws of 1908, was not repealed by Ch. 214 of the Laws of 1912. The above section of the Laws of 1908 was merely amended by the Laws of 1912, but the amendment made did not affect that part of Sec. 1746 of the Code, as amended by the Laws of 1908 under which the prosecution for this offense is conducted. Sec. 1746 of the Code of 1906, as amended by Sec. 1, Laws 1908, Ch. 115, in regard to the offense charged in this affidavit, is as follows: "If any person shall sell or barter, or give away to induce trade, or keep for sale, or barter, or to be given away to induce trade, any vinous, alcoholic, malt, intoxicating or spirituous liquors, or intoxicating bitters, or other drinks, which if drunk to excess will produce intoxication, such person, and all others who may have owned or had any interest at the time in the liquors, bitters or drinks, sold or bartered, or given away to induce trade, or kept for sale or barter, or to be given away to induce trade, contrary to law, shall, on conviction, be fined not less than fifty nor more than five hundred dollars, or be imprisoned in the county jail not less than one week, or more than three months, or both."

The affidavit in this case was made under the above statute, and the prosecution is conducted under it. The only change which the amendment made in the law was to make more severe the penalty to be imposed for a second and third conviction of a violation of the liquor laws, but this appellant cannot complain of the change in any event, for he is not being prosecuted for a second or third violation, but for a first violation.

No person can be punished for a second or third violation if a severer punishment is to be imposed for a second or third violation unless the indictment or affidavit

so charges. If it does not, the court is without power to inflict the severer punishment. *Hoggett v. State*, 57 South. 812. If the indictment or affidavit does not charge that the offense is a second or third offense, the court will presume it to be a first offense always and inflict punishment accordingly. 10 Ency. Plead. & Prac. 489.

But, if the above statement of the law relative to this case was different, this appellant would not have any right to complain because under Sec. 1573 of the Code of 1906 it is expressly provided, that: "No statutory change of any law affecting a crime or its punishment or the collection of a penalty shall affect or defeat the prosecution of any crime committed prior to its enactment, or the collection of any penalty, whether such prosecution be instituted before or after such enactment; and all laws defining a crime or prescribing its punishment, or for the imposition of penalties, shall be continued in operation for the purpose of providing punishment for crimes committed under them, and for collection of such penalties, notwithstanding amendatory or repealing statutes, unless otherwise specially provided in such statutes."

This statute is a saving clause for every statute, enacted which makes "a change of any law affecting a crime, or its punishment" unless otherwise provided in the statute making the change. Under the above statute, any crime committed prior to the enactment of any law making a change is prosecuted under the law as it stood before the change was made, and no person charged with a crime committed before the change was made is affected in any way. The effect of the above statute is to write into every law "affecting a crime or its punishment" a saving clause as effectually as if the changed statute itself contained it.

Suggestion of errors overruled.

JOHN PAYNE v. STATE.

[58 South. 532.]

CRIMINAL LAW. *Appeal. Right to trial de novo. Code 1906, Sec. 87.*

Under Sec. 87, Code 1906, so providing, when an appeal is prosecuted from a conviction by a justice of the peace to the circuit court, said appeal shall be tried *de novo*, and what was done in the justice court can in no wise affect the right of appellant to a trial in the circuit court, nor can any motion made in the circuit court prejudice his right to a trial of the case on its merits.

APPEAL from the circuit court of Jefferson Davis county.

HON. A. E. WEATHERSBY, Judge.

John Payne was convicted of unlawfully pointing a gun at a person and appeals.

The facts are fully stated in the opinion of the court.

J. C. Oakes, for appellant.

We think it is only necessary to call the court's attention to the special bill of exceptions taken by appellant in the court below. If there is any force in Sec. 87 of the Code of 1906, the appellant had a right to appeal from the judgment of the justice of the peace and to have his case tried anew in the circuit court. This right the court below denied him, as shown by the special bill of exceptions. The appellant was present in court, ready for trial, and demanding a trial, and why the court denied it to him I confess to be beyond my ken.

Frank Johnston, assistant attorney-general, for appellee.

Sec. 87 of the Code of 1906, in its closing paragraph, provides that when an appeal is prosecuted from a conviction by a justice of the peace, to the circuit court,

said appeal shall be tried *de novo*. If this section of our Code has any validity, it appears to me that appellant was entitled to a trial in the circuit court from which he prosecuted this appeal.

It may be conceded that the motion of appellant made in the circuit court asking for his discharge, was entirely untenable and unreasonable, but, in my opinion, this could not affect the procedure as established by the statute of this state in reference to an appeal prosecuted from a conviction in a justice court to the circuit court, nor do I perceive how this motion that the defendant made could have prejudiced his right to a trial of the case. In addition, I may add, that I cannot perceive on what ground the motion of the district attorney to dismiss this appeal with a writ of *procedendo* could have been sustained in view of the plain directions as embodied in our statute.

Cook, J., delivered the opinion of the court.

Affidavit was made by the constable before a justice of the peace, charging appellant with unlawfully aiming a gun at a person named. A jury was summoned by the constable to try him; whereupon he made a motion to discharge the jury summoned, because they were selected by an interested party, to wit, the constable, who made the affidavit against him. This motion was overruled, and he was then tried by the jury, and was convicted and sentenced. An appeal was prosecuted to the circuit court, and there appellant made a motion to dismiss the case "because the record does not show that the defendant was convicted by the jury called to try his case in the justice court, and for the further reason that the case was not tried in term time, but was tried in vacation, over the protest of defendant." This motion was overruled. The district attorney, not to be outdone by defendant, countered with a motion to dismiss the appeal, which motion was sustained by the

court, over the earnest protest of defendant, who demanded a trial *de novo*.

It is difficult to understand why the court dismissed the appeal. Sec. 87 of the Code of 1906 provides that, when an appeal is prosecuted from a conviction by a justice of the peace to the circuit court, said appeal shall be tried *de novo*. What was done in the justice court can in no wise affect the right of appellant to a trial in the circuit court, nor can any motion made in the circuit court prejudice his right to a trial of the case on its merits.

Reversed and remanded.

J. D. HARRIS, ADMINISTRATOR C. T. A. ESTATE, G. R. TOWNSEND, DECEASED v. MRS. ROXIE BOYLES TOWNSEND.

[58 South. 529.]

1. CONTRACTS. *Construction. Limitation of actions. Notes.*

In construing contracts, effect must be given to each word contained in it and if the language thereof is plain and unambiguous it is unnecessary to invoke any rule of construction in order to interpret it.

2. PROMISSORY NOTE. *Time of payment. Statute of limitations.*

Where a promissory note provided for payment on demand or on the death of the maker, suit could be brought either before or after the death of the maker, but the statute of limitations will not commence to run until after his death.

APPEAL from the circuit court of Montgomery county.
HON. G. A. McLEAN, Judge.

Suit by Mrs. Roxie Boyles Townsend against J. D. Harris, administrator. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Hill & Knox, for appellant.

The note sued on was made on the 14th day of March, 1904, and in the beginning reads thus: "On demand, or at my death, I, or my estate promise to pay. . . ." It will be noticed that the deceased departed this life on or about June 10, 1910, more than six years after the execution of this note. Our contention is that the right of the appellee to sue on this note accrued to her more than six years before the death of G. R. Townsend, the maker thereof, and that the said note was barred by the statute of limitations after six years from the date of its execution, for the reason that the said note was payable on demand and the appellee, Mrs. Roxie Boyles Townsend, could have brought suit on said note immediately after its execution, or, at least, after the three days of grace elapsed. See the following authorities: *Butts v. Railroad Co.*, 63 Miss. 462, 25 Cyc. 1071, par. f; also p. 1066, par. 2, especially the latter part of said paragraph 2 which reads thus: "The true test therefore to determine when a cause of action has accrued, is to ascertain the time when plaintiff could first have maintained his action to a successful result."

25 Cyc. 1100, par. 11: "When payable on demand." On this point see especially what our own court, in the case of *Johnson v. Pyles*, 11 Smedes & Marshall, 189, says as to when the statute of limitations begins to run. In this case the court says at page 193: "The statute of limitations begins to run whenever the cause of action accrues. In other words, the time limited is to be computed from the day upon which the plaintiff might have commenced an action for the recovery of his demand. Angell on Lim., 181."

Since the appellee, Mrs. Roxie Boyles Townsend, could have brought suit on this note against the deceased in his lifetime at least three days after the execution thereof—and certainly no court would hold that she could not have done so, nor could Townsend have de-

fended upon the ground that the suit had been prematurely brought—then her right of action accrued at the time she could have brought suit thereon, and the statute of limitations began to run from that time, and not from the date of the death of G. R. Townsend, deceased. Our contention is that the appellee had no right of election in the matter, and could not wait more than six years after the execution of the note to bring her suit thereon; for we contend that the words, “or at my death,” as used in said note were mere surplusage, and did not in any way give to appellee the right to wait until the death of G. R. Townsend to bring her suit, if the death of Townsend occurred more than six years after the execution of the note sued on. That is to say, that the appellee had no right to wait until after the death of G. R. Townsend, deceased, to bring her suit on said note, but that it was her duty, under the law, to have brought her suit against the deceased within six years after the date of the execution of the said note; and she having failed so to do, we contend that she is barred of her right of recovery and that the court below should have excluded the note from the consideration of the jury, and should have instructed the jury to find for the appellant.

The words, “or at my death,” used in the note, did not prohibit the appellee from bringing suit upon said note immediately after the execution thereof, nor was the appellee required to first make a demand for payment upon the said Townsend before she could have instituted suit against him on said note, nor was she required to wait until the death of the said G. R. Townsend to bring her suit; but it was her duty to have brought it within six years after the execution of the note. In the case of *Butts v. Railroad Co.*, 63 Miss. 465, the court says: “Suit may be brought on an ordinary bill or note, payable on demand generally, on the day of its date or immediately, without demand being previously made, and

consequently the statute of limitations would begin to run against such an instrument from that date.” And also says “and the principle is the same when the note or bill is payable on demand at a particular place.”

It was not necessary under the decisions of our own and of other courts hereinbefore cited, for the appellee to have first made a demand upon the deceased in his lifetime before she could have brought suit on said note, but even if it had been, then the appellee was not a competent witness to testify against the estate of the deceased to the effect that she had not made any demand upon the deceased in his lifetime for the payment of said note. Sec. 1917 of the Mississippi Code of 1906.

Vernon D. Rowe, for appellee.

The note sued upon in this case has alternative maturity dates, and reads as follows:

“\$292.50.

Mar. 14, 1904.

“On demand or at my death I or my estate promise to pay to Roxie Boyles Townsend the sum of two hundred ninety-two dollars and fifty cents value received with interest at ten per cent per annum from date until paid. Witness my hand and signature.”

There is a maturity of even date with the note, and there is another maturity at the death of the maker of the note. When the first maturity date is under consideration, there can be no controversy as to when the statute of limitations began to run, because the rule is well-settled that, a note payable “on demand” generally, is due at once, and, of course, such a note is barred in six years from its date or at most, in six years, allowing three days of grace.

But, this is not such a note. Here is a note payable on demand, or at the death of the maker. The rule stated above does not apply here. If it did, then it would permit the maker of a note to insert, in the alternative, a

second due date, by which he contracts to pay a sum of money, either at one time or another, and then afterwards repudiate the obligation by pleading the statute of limitations against the note, reckoning from the first due date, and this would let down the bars of fraud.

Now, both of these maturity dates are certain. The present is a certainty, and death is a certainty. "A note, payable one day after date, or at death of the maker, is a good note and binding upon the maker's estate." 1 Daniel on Negotiable Instruments (2 Ed.), 39. Under this authority, it is impossible to regard the phrase, "or at my death," in the note at bar, as mere surplusage, as contended by counsel for appellant.

A note may be so drawn as to be payable at once, or on the happening of a contingency, in the alternative, if you please, thus giving to the payee the option or choice as to which maturity date shall control him in his action with reference thereto. Wood on Limitations (3 Ed.), 321, citing *Waters v. McBee*, 1 Lea (Tenn.), 364, in which case the court said: "It is the duty of the court to arrive at the real intention and meaning of the parties, and we will not readily yield to a construction that results in a palpable absurdity and manifest injustice."

What was the intention of the maker of the note at bar when he gave it to his wife, promising thereby to pay her a sum of money on demand or at his death? It is plain upon the very face of the instrument that he meant that he would pay this note at any time prior to his death, upon her demanding it. And, further, that, if she never chose to demand payment of him, then the money should be paid to her at all events, even after his death whenever his death should occur. This note should be construed for all that it reasonably means, and that, too, most strongly against the maker. He meant to say that his wife might delay the making of her demand or that she might never make a demand.

Yet, should she make a demand of him, she should get her money, and should she never make a demand of him, then his estate should bear the burden of paying her. The choice was hers to make demand of him and obtain her money, or to wait until the maker's death and then collect it. Such is the plain intention and meaning of the obligation, and any other view does violence thereto, and permits a fraud upon the payee of the note. Delay in making demand, or the possibility of a demand never being made upon the maker of the note in his lifetime, either and both, were contemplated by the maker of the note, when he wrote it and signed his name to it. And, where, by the terms of an obligation payable on demand, delay in making demand is contemplated, there is no rule of law which requires that demand be made within the statutory period for bringing an action. 7 Cyc. 849, note 92. The trial court correctly applied these principles, holding that the statute of limitations began to run at the death of the maker of the note,—the last due date instead of the first due date. Attention is here directed to the note to the case of *Wenman v. Insurance Co.*, 28 Am. Dec. 468, where after stating the rule the following statement is made: "But if the tenor of the instrument is such as to indicate a clear intention to the effect, no action will lie thereon until after an actual demand and refusal, and the statute of limitations does not begin to run until then." This is the rule with reference to contracts. *Collardo v. Tuttle*, 24 A. D. 627; *Ware v. Hewey*, 57 Me. 391, 99 A. D. 781, note. "Where demand is necessary, statute does not begin to run until demand is made." In all the cases upon the subject of "on demand," where there are qualifying words to show the intent and meaning, the courts are governed by the qualifying words, as for example where a note is payable on demand at a particular place. It is held that demand must be made at the particular place. *Butts v. Railroad*, 63 Miss. 462. It is the same rule that is followed

in the construction of wills. The testator, by one stroke of the pen, may devise a life estate to a person, and, by another stroke, he may use words and phrases that bestow upon the same person the title in fee; in which case the courts hold that the last stroke of the pen must control, to the exclusion of the first stroke. This because the intention controls. Why should there be any deviation in the construction of a promissory note?

The authorities cited by counsel for appellant, upon the question of the accrual of the right of action, do not "hit the spot" because counsel do not take into consideration the proposition of the alternative. The only way counsel attempt to meet the proposition of the alternative is to say that it is mere surplusage, and no authorities are cited to sustain their contention that it is surplusage. If the option given the payee in this note is to be regarded as mere surplusage, then the intention and meaning of the note are brushed aside, and the contract destroyed. The courts do not destroy contracts; they construe contracts.

SMITH, J., delivered the opinion of the court.

Appellee's husband during his lifetime executed and delivered to her the following promissory note:

"\$292.50.

March 14, 1904.

On demand or at my death I or my estate promise to pay to Roxie Boyles Townsend the sum of two hundred ninety-two dollars and fifty cents, value received, with interest at ten per cent. per annum from date until paid.

Witness my hand and signature.

G. R. TOWNSEND."

Mr. Townsend lived more than six years after the execution of this note, and after his death this suit was filed in the court below against his administrator to collect it. The defense relied upon by the administrator is that the note is barred by the statute of limitations.

The contention of appellant is that the words "or at my death" and the words "or my estate" in this note are surplusage, that therefore it was collectible on demand, and consequently the statute of limitations began to run against it immediately upon its execution, or, if these words are not surplusage, that appellee still had the right to collect it, and if necessary to institute suit on it, immediately upon its execution, and that consequently the statute of limitations began to run at that time.

Neither of these positions are tenable. We must, if possible, in construing any contract, give effect to each word contained in it; and, if the language thereof is plain and unambiguous, it is unnecessary to invoke any rule of construction in order to interpret it. While the intention of the parties to this note is succinctly, it could not have been more plainly, expressed.

It is clear that the payee had a right to collect the note at any time she so desired during the life of the maker, and also that she had the option of waiting until his death to collect it. It is true she had the right to sue on the note at any time she so desired, but it is also true that she had a right to wait until the death of the maker so to do; and consequently the statute of limitations did not begin to run until that event occurred.

The court below having tried this cause in accordance with these views and permitted appellee to recover upon the note, its judgment is affirmed. *Affirmed.*

J. H. BURRAGE v. STATE.

[58 South. 217.]

1. **CRIMINAL LAW.** *Appeal. Preservation of objections. Motion for new trial. Competency of jurors. Peremptory challenge. Special judge. Receiving verdict on Sunday.*

Where the court permitted the district attorney over the objection of the defendant to cross-examine him with reference to his application for a continuance, but no question was asked with reference to his guilt or innocence of the crime charged against him, such action by the court cannot be considered on appeal, where the point was not reserved in a motion for a new trial and was therefore waived.

2. **COMPETENCY OF JUROR.** *Personal opinions. Negro testimony.*

Even where the jurors have been accepted by both sides and the panel is complete, one of the panel may be challenged for cause, where the evidence relied on by the state is negro testimony and such juror admits that he would not convict on negro testimony.

3. **SAME.**

In such case the peremptory challenge of the juror was harmless as such juror was incompetent and should be set aside for cause.

4. **SPECIAL JUDGE.** *Powers.*

Where during the progress of a trial for murder it becomes necessary for the judge presiding to leave the court and absent himself therefrom for several days and the governor in accordance with the statute, governing such cases appointed a special judge by consent of all parties, to preside over the court in the absence of the regular judge such special judge was empowered to try all issues which might be presented to him during the absence of the regular judge.

5. **SAME.**

In such case the fact that the special judge continued the trial from the point where the regular judge had left off, cannot on appeal be assigned as error and it is immaterial that the regular judge had consented that this assignment of error might be made.

6. SUNDAY. Reception of verdict.

The reception of a verdict in a murder case on Sunday is not invalid, its reception being merely a ministerial act.

APPEAL from the circuit court of Madison county.

HON. W. A. HENRY, Judge.

J. H. Burrage was convicted of murder and appeals.

The facts are sufficiently stated in the opinion of the court.

W. H. & R. H. Powell, for appellant.

We cannot in this brief or in oral argument, which we desire, elaborate all of the errors that we have assigned, twenty-five in number, and will have to trust to the court to give to each assignment, such consideration as may be merited.

Certainly the court erred in not granting the continuance and in not granting a new trial, and in other respects which we will now discuss.

It is an old saying that "it is bad to swap horses in the middle of the stream." That was done for us, and we believe was one of the causes of conviction.

Judge Henry presided a while and Judge Robert Powell presided for a while. We do not believe that this was legal. We told Judge Henry that we would not make any point on this, and we intended to keep our contract, but he magnanimously has released us from that agreement, and requested us, or rather agreed that we should raise this question as error. We insist that this was error and a mistrial should have been entered. Judge Powell, who did not hear the testimony but who was presiding during the argument could not and did not stop the district attorney in commenting upon matters, not in evidence, to the great detriment of defendant, because he did not know what had been adduced in evidence. The jury was locked up two days waiting for Judge Henry to return to court and the trial was sus-

pended and did not resume until Judge Powell ascended the bench on Saturday. The jury was tired out and gave a Saturday night verdict, or rather a Sunday morning verdict hostile to the defendant.

The jury deliberated on Sunday and actually returned the verdict in this case on Sunday and Judge Powell accepted the verdict on Sunday and finally discharged the jury on Sunday, and for this the defendant moved in arrest of judgment as shown by the record which the court overruled, record 377, and we have assigned that as error.

Now, we are aware that in some states, this would be legal, because of the statute law of such state, or the want of such statute.

But in Mississippi, Sunday or rather the Sabbath is made a "*dies non*" by the statute and only those things can be done on the Sabbath, as are expressly authorized by the statute. For example, by Sec. 143, of the Code, attachment can be executed on Sunday, by Sec. 992, writs of *habeas corpus*, etc., may be executed on Sunday. By section 1367, druggist may sell medicines on Sunday, but nowhere, in the Code can we find that it is legal for a jury to deliberate on a murder case on Sunday. Nowhere in our Code can we find that a jury can return a verdict on Sunday or that enables a judge to accept such verdict, and finally discharge the jury from the consideration of the case. "*Expressio unius est exclusio alterius*," I believe is the maxim. We say that this defendant was not convicted on a legal day, in a legal way, and that the motion to arrest judgment should have been sustained.

We do not wish the court to think we have waived any of the errors assigned, because we have not discussed them, for we do not waive any of them, but we have not discussed each one for the reason that this brief is becoming prolix, and wearying to the court.

The court below committed fatal error in allowing the state to peremptorily challenge the juror, T. J. Pitch-

ford, after he had been accepted by the state and presented to defendant and after the defendant had accepted him.

See record where the jury of twelve men, including Pitchford, is tendered to the state for acceptance or rejection, and after the state accepted him as a juror the defendant accepted him. See further examination of Pitchford on pages 74 and 82.

The court after such acceptance, by both the state and defendant, allowed the state to peremptorily challenge him over objection of defendant.

This was fatal error and must alone cause a reversal of this cause.

By Code 1871, Sec. 2761, it was provided that "All peremptory challenges by the state shall be made before the juror is presented to the prisoner."

This section was construed by your honorable court in *Stewart v. State*, 50 Miss. 587, *et seq.*, wherein the case was reversed for this same error. On page 589 thereof, near the bottom, the court said:

"The peremptory challenge of a juror by the state after he had been presented to the prisoner was in disregard of the positive letter of the statute. The Code, Sec. 2761, enacts that all peremptory challenges by the state shall be made before the juror is presented to the prisoner." And on top of page 590, the court further said: "Hence, the motion for a new trial ought to have been sustained. This result is inevitable. All persons accused of crime are entitled to trial according to the forms, and the letter and the spirit of the law." We say "*les ites scriptu est.*"

This case has not been overruled, modified, or distinguished and was the law in 1874 and has ever been since. This section on this point was re-enacted in the Codes of 180 and 1892, Sec. 1423, and Code 1906, Sec. 1496, and Laws of 1908, Ch. 172, page 187.

All these subsequent enactments of the Code of 1871 were with the full knowledge of the construction by this

court in the *Stewart case, supra*, and it must be conclusively presumed that the legislature was satisfied with such construction, as no change was made in such later enactments.

W. J. Croom, for appellant.

During the trial of this cause after the state had accepted the panel, and the panel had been presented to the appellant, the state over the objection of the appellant, was permitted to peremptorily challenge the juror, Pitchford, and that after Pitchford had been accepted both by the state and the appellant, and mark you this was done by the state peremptorily not by a challenge for cause but by a peremptory challenge, and this I say, was in the very teeth of the statute, Sec. 1496 of the Code, and in the face of *Stewart v. State*, 50 Miss. 587, and I say that this was fatal error.

During the further progress of this trial, Judge W. A. Henry vacated the bench, and Judge Robert Powell, who had not heard any of the testimony, and knew nothing about the facts in the case, was appointed, and took the bench, and finished the trial of this case, which, I say, was error. That if for any reason Judge Henry, the presiding judge, could not finish this trial, a mistrial should have been entered, and a new trial had. In concluding this trial before Judge Powell, many errors took place which the court could not help, being then presided over by Judge Powell, and he not being in a position to rule on the questions brought before him, because he said that he did not hear the evidence and therefore could not rule.

Ross Collins, attorney-general, for appellee.

As to the error assigned on account of the action of the court for excusing the juror, Pitchford, we submit that it was not error to excuse him, and if error, was not prejudicial to the defendant.

The facts about this juror are: that he qualified on his first examination and the district attorney accepted him, and turned him and the balance of the panel over to the defense. When the defendant's lawyers examined him, it developed that he would not convict any man on the testimony of negroes; thereupon the district attorney proceeded to question the juror further with reference to his aversion to convicting on negro testimony. When it became clear that Pitchford was incompetent to sit in this case due to the fact that all of the witnesses were negroes, and before the district attorney had completed his examination of him, the counsel for defendant objected to any further examination from the district attorney and announced, "The defense accepts Mr. Pitchford and all of the balance of the jury except . . . but before he could complete the sentence, the district attorney interrupted him and said: "Wait a minute. Now I will ask the court for the privilege of withdrawing my acceptance of Mr. Pitchford and I want to challenge peremptorily." This the court allowed to be done and Mr. Pitchford was excused. We submit that the court acted properly. Pitchford had been accepted under a mistake by the district attorney, and it was evidently proper to allow the district attorney to withdraw his acceptance. The defendant was in no way prejudiced. All he was entitled to was a fair and impartial jury, he had no right to have any particular person sit as a juror in his case.

In the case of *Mabry v. State*, 71 Miss. 716, it is held that if any doubt arises as to the competency of a juror, he should be excused. The court has the discretion to do this at any time before the evidence is submitted. Under the disclosure made by Mr. Pitchford that he would not convict on negro testimony, the court had at the time such disclosure was made, and before the evidence begun to be submitted, the right to excuse him for cause. Manifestly it was not prejudicial error for the

court, instead of doing this, to allow the state to challenge him peremptorily.

The case of *Stewart v. State*, relied on by appellant, was entirely different. In that case, there was no incompetency justifying the excuse for cause of the jurors allowed to be peremptorily challenged. In the case at bar, while in form, the juror, Pitchford, was peremptorily challenged, still, as a matter of fact he was in reality, retired from the jury on account of incompetency.

The defendant was not prejudiced; he used only three of his challenges. He was tried by a fair and impartial jury. If Pitchford had been kept on the jury, it would have prevented a fair trial.

SMITH, J., delivered the opinion of the court.

Appellant, having been in the court below convicted of murder and sentenced to imprisonment for life in the state penitentiary, appeals to this court. When the case came on for trial, he filed a motion for a continuance on the ground of the absence of witnesses, who would testify to matters material to his defense.

In order to ascertain the truth of the matters set up in this application, the district attorney, over the objection of appellant, cross-examined him with reference thereto, but asked him no questions with reference to his guilt or innocence of the crime for which he was on trial. The action of the court in permitting appellant to be thus examined is assigned for error, but we cannot consider the same for the reason that the point was not reserved in the motion for a new trial, and was therefore waived.

It appears from the special bill of exceptions that during the progress of the trial in the above cause, which had proceeded to the point of impaneling the jury to try the cause, the state had accepted a full panel of twelve competent, qualified jurors to try the cause, and

had tendered and presented said full panel of twelve jurors, among whom was a juror by the name of T. J. Pitchford, to the defendant, and, after the defendant had accepted the said juror T. J. Pitchford, the state, over the objection of the defendant then and there made, was, by the court on the application of the state, and over the objection of the defendant, allowed to peremptorily challenge and take off of the jury to try this cause the said juror T. J. Pitchford, who had been accepted by the state, and tendered and presented by the state to the defendant, and accepted by the defendant, to try the case."

It appears from the evidence that Pitchford, after he had been accepted by the state, and while being examined by the defendant, indicated that he would not convict any man on trial for murder upon negro testimony; thereupon, the court permitted the district attorney to further examine him, and, in answer to specific questions, he stated that he would not accept, or convict upon, negro testimony. The witnesses by whom the state expected to, and did, prove the guilt of appellant, were negroes. Pitchford was therefore an incompetent juror, and it became the duty of the court to set him aside, even though he had been accepted by both the state and the defendant.

That he was challenged peremptorily by the state, instead of being set aside for cause, is wholly immaterial, for the reason that we must presume that the court, without this challenge, would have discharged this duty of setting the juror aside. The rule announced in *Stewart v. State*, 50 Miss. 587, is therefore not here involved.

During the progress of the trial, it became necessary for the judge presiding to leave the court and absent himself therefrom for several days, and the governor, in accordance with the statute governing such cases, appointed Judge Robert Powell as special judge to preside

over the court in the absence of the regular judge. By agreement between counsel for the state and appellant Judge Powell proceeded with the trial of appellant. In the motion for new trial one of the reasons assigned for the setting aside of the verdict is the fact that this special judge concluded the trial, it being alleged that the defendant was thereby prejudiced for the reason that he, the special judge, had not heard the testimony in the case. Counsel in their brief say that they made their agreement for the special judge to proceed with the case in good faith, intending to abide thereby, but that the regular circuit judge had released them from this agreement, and indicated that he would like to see the point presented to and decided by this court. The appointment of the special judge was regular and in accordance with the statute, and consequently he was empowered to try all issues which might be presented to him during the absence of the regular judge. It may be that on objection by appellant he ought not to have proceeded with his trial, but should have begun anew, as to which we express no opinion, for the reason that appellant having consented thereto cannot now assign it as error, and it is immaterial that the regular judge has consented that this assignment of error be made.

The jury retired to consider their verdict on Saturday night, and at 12:06 a. m. Sunday morning reported that they were ready with their verdict, which the circuit judge thereupon received in open court. This action of the court is assigned for error on the ground that, Sunday being in law *dies non*, a verdict rendered on that day is a nullity. It is true that we have no statute providing that verdicts may be received on Sunday, and it may be that a judgment rendered on Sunday is void, but "in regard to the delivery and reception of verdicts a different rule applies, as the rendering of a verdict is a mere ministerial act, and it is an act of necessity and charity to receive it, and not keep the

jurors confined until Monday." 37 Cyc. 589, and authorities there cited. The court therefore committed no error in receiving this verdict.

After making a careful investigation of all of the other matters complained of, we find no reversible error therein. *Affirmed.*

LAMBERT OVERTON v. STATE.

[58 South. 219.]

1. CRIMINAL LAW. *Appeal and error. New trial. Supporting affidavits. Newly discovered evidence. Instructions. Filed.*

An instruction not marked "filed" by the clerk of the lower court does not become a part of the record on appeal to the supreme court, and the court cannot say whether or not such instruction announced correctly the law applicable to the case, the same not being before the court.

2. NEW TRIAL. *Newly discovered evidence. Impeachment. Appellant.*

A motion for a new trial on account of newly discovered evidence was properly overruled where the affidavit accompanying such motion was not signed by the defendant and by only two of his four attorneys and the newly discovered evidence merely tended to impeach the credibility of the witnesses and was merely negative in its character.

APPEAL from the circuit court of Lauderdale county.
HON. JNO. L. BUCKLEY, Judge.

Lambert Overton was convicted of murder and appeals.

The facts are fully stated in the opinion of the court.

McBeath & Miller, for appellant.

While the assignment of error contained ten grounds, we shall rely upon only two for the reversal of this case.

First, the court refused to consider more than twelve instructions for the defendant, giving as a sole reason that the instructions presented were a greater number than twelve. Among the instructions asked for was one that the jury was the sole judge of the evidence. But the court stated that, while this was the law, he gave as the reason for refusal that he had already given twelve instructions and he would not consider any more.

In the matter of involving the life and liberty of an accused we submit that any such arbitrary ruling is unwarranted and illegal. Notwithstanding the fact that the circumstances might be such that for a counsel to properly place his case before the jury, that it would require more than twelve instructions. Yet the court in total disregard of appellant's rights refused to instruct the jury as to the law.

"We recognize that trial courts have a right to regulate the mode of procedure in their courts, but we do not believe until sanctioned by this court that a trial judge in a case involving the liberty of an accused has a right to arbitrarily say that, When you have asked twelve instructions I will not consider any more."

In the second place this case should be reversed because the learned judge refused to grant a new trial on account of newly discovered testimony.

The rule laid down by all courts for the granting of a new trial on account of newly discovered evidence, is about the same, and is clearly stated in the case of *Gilbert et al. v. State*, 55 So. (Fla.) 464, in which it is held that new trials will be granted only under the following restrictions.

First. The evidence must have been discovered since the former trial.

Second. The party must have used diligence to procure it on former trial.

Third. It must be material to the issue.

Fourth. It must go to the merits of the cause and not merely to impeach the character of a witness.

Fifth. It must not merely be cumulative.

Sixth. It must be such as ought to produce on another trial an opposite result.

We submit that the instant case comes under those restrictions.

No one but a mind reader could have known in advance of the trial that witnesses, whose names did not appear on the indictment and whom we contend were not present at the difficulty, would swear that they saw the difficulty that resulted in Hardy's death.

That the evidence is material to the issue needs no argument. Five witnesses swear that the state witnesses, upon whose evidence appellant was convicted, did not see the difficulty. This is not only material but if the jury should believe them, the verdict would have been one of acquittal.

The newly discovered evidence goes directly to the merits of the case and is no attempt to impeach the state witnesses, but is a direct and flat contradiction of their testimony.

The newly discovered evidence is not cumulative. There was no evidence introduced by the defendant to show that the state witnesses Allan Hardy and Derby Hardy were not present. In the case of *Williams v. State*, 54 So. (Miss.) 857, this distinction is made between cumulative and corroborative testimony. And in this case Judge Anderson says:

"It is undoubtedly the rule that courts will grant with great reluctance new trials founded on newly discovered evidence; especially when such evidence is merely cumulative or which simply tends to impeach the testimony of one or more witnesses who have testified; but where the newly discovered evidence is corroborative, the rule is not enforced with the same strictness as when it is merely cumulative."

In the case of *Railway Co. v. Crayton*, 69 Miss. 152, 12 So. 271, the distinction between corroborative and cumulative evidence is clearly stated.

In *Barrentine v. State*, 51 So. (Miss.) 275, Judge Smith says: "Appellant's newly discovered evidence was material and vital to his defense, and its existence was unknown and unsuspected by him or by his counsel until after the trial in the court below. His motion for a new trial, therefore, ought to have been sustained.

W. W. Venable, district attorney Tenth district, for appellee.

In the first place, the record does not disclose what instructions were asked and refused on the ground that they constituted a greater number than twelve and in fact the record is silent upon the question of instructions, other than those set forth as being given or refused with the exception of a recitation in the bill of exceptions that the court refused to consider certain instructions on the ground that twelve had already been granted, and that it was a rule to grant only twelve. The record fails to show that appellant presented these instructions and had them marked "refused" and "filed;" they do not appear in the record and have not been made a part thereof and, even if it be, which we do not admit, that the court arbitrarily refused to mark them in any manner or to consider them in any wise, it was still the duty of appellant to make them a part of the record by his bill of exceptions, in order that this court might be enabled to say whether or not the appellant was in any wise prejudiced by their refusal.

The record shows what instructions were asked, which ones were granted and which were refused. If any others were requested by defendant in the court below and were denied consideration on the ground alleged, still the defendant did not have them filed by the clerk and they have never been made a part of the record and their refusal or failure to receive consideration will not be noticed on appeal. *Peden v. State*, 61 Miss. 267; *Middleton v. State*, 52 So. 258; *Bank v. Goff*, 12 So. 699; *Filed*

v. *Weir*, 28 Miss. 56; *Shelby v. Brown*, 24 So. 531; *Morton v. State*, 12 So. 829.

The very question was presented before in this state and it was so decided. *Tuberville v. State*, 38 So. 333. This case discloses that "defendants made a motion for a new trial and filed affidavits alleging that they were present when the difficulty occurred, and that the witness Wall was not there, where he testified he was. They filed in support of the motion an affidavit of one of the counsel for the defense that due diligence had been exercised, and they had no information before the trial that these witnesses would testify as set out in their affidavit." The motion for new trial was overruled and defendants appealed and assigned as error the judgment of the court below in denying the motion. This court in response to this assignment says:

"The court properly refused to set aside the verdict and grant a new trial. The newly discovered evidence merely tended to impeach the credibility of one of the state witnesses and was negative in its character; and, moreover, the affidavit showing diligence was not signed by one of defendants' attorneys of record."

A conviction will not be set aside and a new trial granted because of newly discovered evidence to impeach a witness. *DeMarco v. State*, 59 Miss. 355; *Bailey v. State*, 94 Miss. 863; *Williams v. State*, 54 So. 857.

SMITH, J., delivered the opinion of the court.

Appellant, having been convicted of the crime of murder and sentenced to the penitentiary for life, appeals to this court.

He complains, first, that after he had been granted twelve instructions by the court below, the court refused to grant him "any further instructions, for the reason that it was the rule of the court to limit the instructions to twelve." He failed to have his refused instructions marked "Filed" by the clerk; consequently

they never became a part of, and do not appear in, the record. Conceding, but not deciding, that the court should not arbitrarily limit the number of instructions to twelve, before it can be said that an instruction was erroneously refused by the court, it must appear that it correctly announces the law applicable to the case. This we cannot ascertain, unless the instruction itself is before us. This assignment, therefore, is without merit.

None of the witnesses whose names appear on the back of the indictment were introduced by the state; his guilt being proved by other witnesses. In his motion for a new trial, appellant alleges that he has discovered testimony, unknown to him before, by which he will be able to show that the two witnesses by whom the state's case was proven were not present at the difficulty which resulted in the death of deceased. He filed with this motion the affidavits of several witnesses, who state that they were present at the difficulty and that the state's witnesses were not there. This motion was by the court properly overruled. The newly discovered testimony merely tended to impeach the credibility of the witnesses, and was merely negative in its character; and, moreover, the affidavit showing diligence was not signed by appellant, and was signed by only two of his four attorneys. *Tuberville v. State*, 38 South. 333.

Affirmed.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

OCTOBER TERM, 1911.

J. W. McCoy v. STATE.

[57 South. 622.]

1. GRAND JURY. *Excusing members of grand jury. Right of court and of foreman. Effect on indictment. Code 1906, Sec. 2704.*

The foreman of a grand jury has no right to discharge a member after the grand jury has been legally empaneled, but the court can for sufficient reason discharge a part of the grand jury and substitute others and should do so where the discharge of members would reduce the number below fifteen members.

2. SAME.

Where after a grand jury of eighteen members was duly empaneled the foreman excused four members, thereby reducing the number to fourteen members, this did not prevent the grand jury from proceeding with business.

3. SAME.

In view of Code 1906, Sec. 2704, providing that the empaneling of the grand jury shall be conclusive evidence of its competency and qualification and of the common law rule, that to render an indict-

ment valid, it is only necessary that twelve of the grand jurors consent, an indictment voted for and returned by only twelve members of a legally constituted grand jury is valid.

APPEAL from the circuit court of Pearl River county.
HON. A. E. WEATHERSBY, Judge.

J. W. McCoy was convicted of white-capping and appeals.

Appellant was indicted at the April term of the circuit court of Pearl River county for the crime commonly called "white-capping," as defined by Sec. 1398, Code of 1906. He was convicted, and sentenced to the penitentiary for five years. From this sentence and judgment, he appeals to this court.

On the facts of this case, appellant certainly has no ground for complaint at the verdict rendered. The proof fully warranted the jury in returning the verdict they did—"guilty as charged." The only assignment of error we will consider in this case is that "the court erred in overruling the motion to quash the indictment." The motion is as follows:

"And now comes the defendant in the above-styled cause, by his attorneys, and moves the court to quash the indictment returned against him herein, and in support of said motion assigns the following reasons why the same should be sustained, to-wit: (1) Because heretofore, on the 10th day of April, 1911, the grand jury which returned this indictment was duly impaneled, sworn, and charged according to law, and immediately began the investigation of violations of the law, and on the first day of the organization of said grand jury it heard and considered all of the testimony in the case, and continued its deliberations on said case throughout the whole of Tuesday, the 11th of April, same being the second day of grand jury's deliberations, and failed to return a bill of indictment against the defendant, and that accordingly on Wednesday, the third day of said jury's deliberations, the foreman of said grand jury, acting upon

the instructions of the district attorney, unlawfully and without legitimate or just cause for so doing excused four members of said grand jury from the grand jury room while deliberating on the merit of this case, said excused members being in no wise related to the defendant, and having absolutely no interest in the matter under investigation, one of whom lived in the extreme southern portion of Pearl River county, the offense having been alleged to have occurred in the extreme northern part of said county, the names of which said excused grand jurors are as follows, viz.: Will Lee, Print Smith, Webb Ladner, and Adolph Ladner. That immediately after said members were excused from said grand jury, and retired from the grand jury room, the remainder of said grand jury, in the absence of said excused members, and denying them the right to participate in the same, proceeded again to deliberate over said alleged offense and discuss the same, and then proceeded to return the indictment which is herein filed against the defendant. (2) Because four disinterested members of the grand jury were denied the right to participate in the investigation and discussion of this alleged offense. (3) Because at the time this indictment was returned the grand jury consisted of only thirteen members, after having excused the four above referred to."

Upon this motion the court ruled as follows: "The defendant offers to introduce evidence to establish the allegation in said motion, the court being of the opinion that the facts stated and alleged in said motion are insufficient to warrant the quashing of said indictment, and after hearing and considering said motion, the same is hereby overruled," to which action of the court the defendant then and there excepted.

T. E. Salter and Toxey Hall, for appellant.

The first assignment of error in the defendant's motion for a new trial is that the court erred in overruling

the motion to quash the indictment. It will be observed that this motion states that "the foreman of said grand jury, acting upon the instruction of the district attorney and the county attorney, unlawfully and without legitimate or just cause for so doing, excused four disinterested members of said grand jury from the grand jury room while deliberating on the merits of this case."

The only authority vested in a district attorney while attending the deliberations of the grand jury is that conferred by Sec. 1663 of the Mississippi Code of 1906, which reads as follows: "The district attorney shall attend the deliberations of the grand jury whenever he may be required by the grand jury, shall give the necessary information as to the law governing each case, in order that the same may be presented in the manner required by law."

We contend that neither the district attorney nor county attorney has any right to dictate to the grand jury what their procedure shall be. It certainly cannot be argued that the county attorney has any more authority in the grand jury room than has the district attorney, and it is our contention further, that the district attorney has not right, even to attend the deliberations of the grand jury except "whenever required by the grand jury," and when required by them to attend their deliberations the district attorney is only authorized to "give the necessary information as to the law governing each case." He has no authority to dictate to the foreman or to the grand jury what he shall or shall not do while investigating an alleged offense, and he has no authority to instruct the foreman or the grand jury to excuse disinterested members for a specific purpose or for any purpose, as was done in this case, and when he does so he usurps the functions of his office.

The action of the grand jury must be voluntary and free from outside influence while investigating and returning a bill of indictment, and must be as free from

the influence of the court and the district attorney as from that of a person who has no connection with the court. See *Blau v. State*, 82 Miss. 514; *Clair v. State*, 28 L. R. A. 367; *Herrington v. State*, 53 So. 783. It was never intended that the district attorney should "instruct" or dictate to the grand jury as to what they should or should not do while investigating a matter.

Claude Clayton, assistant attorney-general, for appellee.

It is unnecessary in disposing of this case to comment in any manner upon the testimony of the witnesses therein so I will at once proceed to come to the first assignment of error relied upon by counsel and upon which he asks that this case be reversed, to wit, that the motion to quash the indictment should have been sustained.

This motion to quash the indictment was predicated upon the fact that there was no legal grand jury that returned the same, for the reason that at the organization of the grand jury, it was originally composed of eighteen (18) men, and subsequently, and before the finding of the indictment, four (4) of these were excused by the foreman, thereby leaving fourteen (14) men to constitute the grand jury at the time the indictment was returned.

In support of the motion to quash the indictment, counsel for the appellant offered to introduce testimony to establish the allegations contained therein (see order overruling motion to quash, page 12), the court being of the opinion that if the allegations were established, they would not warrant the sustaining of the motion.

Under the authority of this court, as announced in the case of *Posey v. State*, 86 Miss. 141, the opinion being delivered by Judge Truly, it was held that less than fifteen (15) men did not constitute a legal grand jury. Therefore, it must follow, there being fourteen men on the jury when the indictment was returned, that the in-

dictment was void, and the demurrer to the indictment should have been sustained; or if there had been a doubt as to the number of men on the grand jury at the time of the finding of the indictment, then counsel for appellant should have been given the opportunity to have established the same.

McLAIN, C. (after stating the facts as above).

This motion to quash the indictment is based upon the idea that there was no legal grand jury that found and returned the indictment. From the record in this cause, it is evident that the grand jury was duly and legally organized with eighteen men. After they retired to their room to consider of their business, and before the finding of this indictment, four of these were excused by the foreman, thereby reducing their number to fourteen members present at the time this case was considered and indictment found and returned into open court.

It is contended that "under authority of the court, as announced in the case of *Posey v. State*, 86 Miss. 141, 38 South. 324, the opinion being delivered by Judge Truly, it was held that less than fifteen men did not constitute a legal grand jury; therefore it must follow, there being only fourteen men on the grand jury when the indictment was returned, that the indictment was void," etc. We do not think that the facts in this case are applicable to the above announcement of the court. This quotation from the opinion of Judge Truly we fully indorse; but we are clearly of the opinion that the facts of this case are quite different from the facts involved in that case. After this grand jury retired to consider of its business, the foreman had no power to discharge finally any member of the grand jury from the panel after it was duly organized by the court. That power alone is in the hands of the court. The court can, for good and sufficient reason, discharge a member from

the grand jury after it has been duly impaneled and retired for business, making it a matter of record; and he may, if he sees proper, substitute, or rather appoint, another in his place. This the court should certainly do, if the discharged members reduce the panel below fifteen.

This grand jury was legally organized with eighteen members. Our law provides that the grand jury shall be organized with not less than fifteen members, and this grand jury was legally organized with eighteen members; and the fact that the foreman, for good and sufficient reasons, we take it, excused four members of the same, thereby reducing its numbers to fourteen, did not prevent the grand jury from proceeding with business. At the time this bill was found, there were fourteen members present of the constituted grand jury of eighteen. This was sufficient for the grand jury to transact business. Indeed, twelve would have been a sufficient number. Whatever the number of the organized grand jury, twelve jurors, by the unwritten rule, and largely by statutes, are an adequate quorum for business. Bishop's New Criminal Procedure, section 854. But there are states in which statutes variously provide otherwise. But "in England and all of our states, to render a finding valid, twelve of the grand jurors must consent; nor need more than twelve, even though this body should consist of the full number of twenty." Bishop's New Crim. Proc., section 854.

The record in this case shows that at least twelve of the grand jury, when passing upon the question whether a bill should be returned against appellant, voted in the affirmative. At least twelve of the grand jury were present when the bill was returned. We think the indictment was found and returned by a legal grand jury. This grand jury was legally constituted, and was a legal grand jury when considering this case, and was a legal grand jury when it returned the bill, and we think the

court properly overruled the motion to quash. "The judicial records of this country furnish mortifying testimony that many culprits have gone free, unwhipped of justice, because of technical exceptions taken to the grand jury who preferred the indictment." *J. W. Head v. State*, 44 Miss. 749. "For remedy for this sore grievance" the legislature has embodied into our statute section 2704, Code 1906. We cite a few of the many authorities throwing light in a more or less degree upon this subject: Code 1906, section 2704; *Posey v. State*, 86 Miss. 142-145, 38 South. 324; *Cain v. State*, 86 Miss. 505, 38 South. 227; *Logan v. State*, 50 Miss. 277; *Dixon v. State*, 74 Miss. 282, 20 South. 839; *Head v. State*, 44 Miss. 749; *Durrah v. State*, 44 Miss. 789; *Lee v. State*, 45 Miss. 116; *Nichols v. State*, 46 Miss. 286; *Chase v. State*, 46 Miss. 697.

We think the case should be affirmed.

Affirmed.

PER CURIAM.—The above opinion is adopted as the opinion of the court and for the reasons therein indicated the judgment is affirmed.

GEO. T. DOUGLAS ET UX. v. PARSONS-MAY-OBERSCHMIDT COMPANY.

[57 South. 624.]

APPEAL AND ERROR. *Jurisdiction. Supersedeas bond. Dismissal. Liability on bond.*

The supreme court has no jurisdiction to discharge a *supersedeas* bond on motion where such bond has served the purpose for which it was given, on the grounds that the sureties were misled into signing it and that one of them notified the clerk before the bond was filed not to approve it, nor could the supreme court discharge such bond on an original proceeding in said court.

APPEAL from the chancery court of Lincoln county.

HON. G. G. LYELL, Chancellor.

Suit by Geo. T. Douglas and wife against the Parsons-May-Oberschmidt Company. Motion to dismiss and discharge the *supersedeas* bond in the supreme court.

George T. Douglas and wife, being indebted to the Parsons-May-Oberschmidt Company, executed a deed of trust to secure said indebtedness. Default having been made in the payment of said indebtedness, the trustee advertised the property for sale, whereupon Douglas and wife filed a bill in chancery enjoining the sale and praying an accounting. On the hearing (October 22, 1910) the appellee obtained a decree for an amount admitted to be due; said decree providing that a lien should attach to all the property described in the trust deed to secure the payment of the amount of the decree, and appointing a commissioner to sell said property and apply the proceeds to the payment of the amount decreed in case same was not paid, and report the sale back to the court. Douglas and wife failed to pay the amount adjudged against them in the decree, and the property was advertised by the commissioner for sale. Thereafter Douglas and wife filed a petition with the clerk, praying an appeal, and on January 4, 1911, executed bond, with sureties approved by the clerk; said bond operating as a *supersedeas*. No further steps were taken by the Douglasses to perfect their appeal, and on May 30, 1911, the Parsons-May-Oberschmidt Company filed a motion in the supreme court to dismiss the bill for want of prosecution. No action was taken at that time on the motion to dismiss.

The record was filed on November 4, 1911, and thereafter the sureties on the *supersedeas* bond appeared and moved the court to dismiss the appeal and discharge the *supersedeas*, alleging that they had served notice on the clerk before the approval of the bond that they desired to withdraw therefrom, and before the record

was transcribed had given notice of their desire to be released, and because they were convinced that the bill was without merit, but merely for delay, and because they were advised by said Douglas that no appeal would be taken, but that the appeal bond was filed merely to obtain time in which to raise the money, and that they had been misled into signing the same, and, further, that the bond was not in proper form. The case was submitted on both motions.

Jones & Tyler, for sureties appellant.

T. Brady, Jr., for appellee.

No brief of counsel on either side in the record.

SMITH, J., delivered the opinion of the court.

This cause is dismissed for want of prosecution, the motion to discharge the *supersedeas* and relieve the sureties on the bond is overruled, and judgment will be entered here against the sureties on the bond for the decree rendered, with the interest and damages thereon as provided by law. The decree appealed from was a final one, and the bond, whether technically accurate or not, served the purpose for which it was intended. It may be, as stated by the bondsmen, that they were misled by appellant into signing the bond, and that one of them notified the clerk, before the bond was filed, not to approve the same; but these matters cannot be adjudicated on this motion, or, for that matter, by this court on original proceeding here.

Dismissed.

MATT T. SOWELL ET AL. v. JOHN L. SOWELL ET AL.

[57 South. 626.]

1. DECISIONS REVIEWABLE. *Interlocutory decree. Time for appeal. Code of 1906, Sec. 35.*

A decree ordering a sale of lands for partition is an interlocutory decree.

2. APPEAL AND ERROR. *Time for Appeal. Code of 1906, Sec. 35.*

Under section 35, Code of 1906, if an appeal is desired from an interlocutory decree, such appeal "must be applied for within ten days after the date of the decree complained of." An appeal subsequently taken will be dismissed.

APPEAL from the chancery court of Panola county.

HON. D. M. KIMBROUGH, Chancellor.

Suit by Matt T. Sowell et al. against John L. Sowell et al. From a judgment ordering sale of lands for partition, defendant appeals.

The appellee filed a bill in chancery against appellants, alleging that they were tenants in common of certain lands described in the bill, and praying for a sale of said lands, for a division of the proceeds among the owners according to their respective interests. Appellants who were defendants below, answered, denying that appellees, complainants below, owned any interest whatever in the land. Upon the hearing the chancellor entered a decree in favor of complainants, and ordered the lands to be sold for a division of the proceeds, and appointed the chancery clerk as special commissioner of the court to make the sale in accordance with the terms of the decree and report his actions to the next term of the court after such sale, or to the chancellor in vacation. No appeal was obtained at the time, and the decree grants no appeal. Neither was a decree asked within ten days after the rendition of the decree, to wit, Feb-

ruary 1, 1911. Afterwards, on March 25, 1911, the appellants filed a petition with the chancery clerk, praying an appeal with *supersedeas*.

When the case reached the supreme court, appellees filed the following motion: "Now come appellees, by their solicitors, and move the court to dismiss the appeal in this case, discharge the *supersedeas* herein granted, and for an order directing the special commissioner appointed by the court below to proceed to carry out the mandates of said decree, and for grounds for said motion say: (1) This is an appeal from an interlocutory decree of the chancery court, and no appeal was granted by the chancellor in term time, nor in vacation within ten days after the date of the decree complained of, in order to settle the principles of the case, or to avoid expense and delay. (2) No appeal has been granted by the chancellor, either in term time or in vacation, for any purpose whatsoever, and none applied for."

L. F. Rainwater, for appellants.

The decree in the case at bar adjudges complainants and defendants to be tenants in common of the land, declares the deed under which defendants claim exclusive title null and void, and directs the clerk and master to cancel the same upon the records in his office, and decrees that defendants pay the costs; in fact adjudicates everything in controversy, leaving only the confirmation of the sale which, under the decree, may be done in vacation and concerning which there is no controversy.

I respectfully submit that under the definition of a final decree as announced by this court in the case of *Humphreys v. Stafford*, 71 Miss. 135, quoted *supra*, this decree is final.

It is true that in ordinary suits for partition where the rights of the parties are not finally adjudicated, but reserved until the coming in of the commissioner's report, the first decree is interlocutory; but when the

rights of the parties had been adjudicated in the first decree, it is final. 71 Miss. 135; 5 Am. & Eng. Ency. Law (1 Ed.), 373, and note, title Partition; *Whiting v. Bank*, 15 Peters, U. S. 9; *French v. Shoemaker*, 12 Wallace, U. S. 98.

In this latter case (12 Wallace) the court uses this language: "A decree of foreclosure and sale of mortgaged premises is a final decree, and that the defendant is entitled to his appeal without waiting for the return and confirmation of the sale by a decretal order, upon the ground that the decree of foreclosure and sale is final as to the merits and that the ulterior proceedings are but a mode of executing the original decree."

So in 5 Am. & Eng. Ency. Law, cited *supra*, 373, it is stated, "A final decree is one which determines the rights of the parties in the suit or an independent branch of it," and in the note under the title Partition, same page, it is stated: "But when the first decree in partition settles the rights of the parties it is final." See, *Ansley v. Robinson*, 16 Ala. 793; *Benton v. Campbell Heirs*, 2 Dana Ky. 421; *Damouth v. Klock*, 28 Mich. 163. None of the authorities cited by counsel for the motion are applicable to the facts in the case at bar. In the case of *Gilleylen v. Martin*, 73 Miss., cited by counsel, the decree directed a partition to be made by the commissioners if it can be fairly and equitably done, and, if not, they are directed to so report to the next term of the court. It also directed the assignment of dower. The rights of the parties had not been adjudicated, and it did not appear that partition could be made, but the whole matter was still held in abeyance until the coming in of the report.

In the case of *Beeks v. Rye*, 77 Miss., cited by counsel there was no controversy upon the hearing of the original petition; in fact none of the parties defendant appeared. It was an ordinary proceeding in partition, the decree directing a sale on a twelve months' credit, and

directing the costs to be paid out of the proceeds of sale. It provided that the executor's solicitors be allowed a reasonable fee, the same to be fixed on the coming in of the report, and "that the remainder of the proceeds of said property be distributed in accordance with the interests of defendants as shown in said petition," and the executor was directed to report all his actings and doings, etc. A will was filed with the petition as a part thereof, the will being a part of the petition and pointing out who the parties were to whom distribution should be made, and all matters in controversy being thus left open until the final decree, it was interlocutory.

The case of *Sweatman v. Dean*, cited by counsel, in which the opinion was rendered by Cox, special judge, was a proceeding for partition in kind, which did not attempt to divest title out of the parties nor cancel any muniment of title, and it does not appear that the claim of Sweatman was even litigated in the original proceeding, but that he did not offer any proof to his claim until the coming in of the report of the commissioners appointed to make partition. We are led to this conclusion from the fact that when he offered his evidence, viz.: 1st Bill for partition in cause No. 1367. 2d. Decree of sale. 3d. Report of sale. 4th. Confirmation decree. The court excluded all of it, overruled his exceptions and set off the lands in severalty according to the report of the commissioners. A decree for sale of land, divestiture of title and cancelling the muniment of title is quite different from an ordinary proceeding for partition in kind, where all the parties remain *in statu quo* until the final decree of confirmation of title. The court in that case, *Sweatman v. Dean*, referring to the case of *Norris v. Callahan*, says: "The decree in that case was for a sale of lands to pay debts of testator. It was a final decree. It would not be open by exceptions to report of sale." But the court, Campbell, Judge, in the case of *Norris v. Callahan*, does not restrict it to sales to pay debts, but says, page 143: "It is not

allowable on exceptions to a report of sale made under a decree of the court to show error in the decree. Parties summoned to answer a petition to sell land should then present their defense, and will not be permitted to remain silent and, after a sale made and reported, come in and show cause against the decree for a sale." If the decree for sale of land to pay debts was a final decree as said by the court in *Sweatman v. Dean*, referring to the case of *Norris v. Callahan*, then surely the decree in the case at bar was a final decree. It would require a logician of extraordinary powers to differentiate the two cases on principle.

Under the Act of 1910, p. 93, Sheet Acts, it is not necessary for the court to grant an appeal in any case where the evidence is taken down by the stenographer.

Shands & Montgomery, for appellees.

The decree of the court in this case ordering the lands in question to be sold for a division of proceeds among complainants and defendants, appointing a special commissioner for the purpose of making said sale, directing the said special commissioner to make sale and to report his proceedings on a day and date fixed by the court for a final hearing and specifically reserving all other questions for determination on the final hearing, is an interlocutory decree, and may be modified or vacated by the court at any time before final decree, the decree confirming the sale for division, is made: *Gilleylan v. Martin*, 73 Miss. 695; *Beeks v. Rye*, 77 Miss. 358; *Sweatman v. Dean*, 86 Miss. 641; *Gudgell v. Mead*, 40 Am. Dec. 120, 60 Am. Dec., note 11, p. 434, 15 Ency. Plead. & Prac., p. 810.

No order was obtained by appellants from the chancellor in term time, nor in vacation within ten days after the date of the decree complained of, granting an appeal "in order to settle the principles of the case, or to avoid expense and delay," as provided by section 35, Mississippi Code, 1906.

No appeal lies from an interlocutory decree of the chancery court, without first having obtained such an order from the chancellor granting the appeal. The clerk of the court has no power to grant an appeal from an interlocutory decree. Section 35, Mississippi Code of 1906; *Gilleylan v. Martin*, 73 Miss. 695; *Beeks v. Rye*, 77 Miss. 358; *Sweatman v. Dean*, 86 Miss. 641.

Wherefore, appellee respectfully ask that appellants' appeal herein be dismissed, the *supersedeas* herein granted be discharged, and the special commissioner appointed by decree of the court below herein be directed to proceed to carry out the mandates of said decree.

MAYES, C. J., delivered the opinion of the court.

It is our judgment that the decree rendered in this case is an interlocutory and not a final decree. For this reason, this case was dismissed on motion of appellees. The case is again before the court on suggestion of error. That the decree in this case is an interlocutory and not a final decree is settled by the cases of *Gilleylan v. Martin*, 73 Miss. 695, 19 South. 482; *Beeks v. Rye*, 77 Miss. 358, 27 South. 635, and *Sweatman v. Dean*, 86 Miss. 641, 38 South. 231.

Under section 35 of the Code of 1906, if an appeal is desired from an interlocutory decree, it is required that the appeal "be applied for within ten days after the date of the order or decree complained of." In this case, a compliance with this statute was not attempted on the part of appellants, and, of course, this appeal must be dismissed.

The suggestion of error is overruled.

McLEAN, J., dissents.

Dismissed.

LAUREL OIL & FERTILIZER CO. v. F. O. HORNE.

[57 South. 624 and 58 South. 652.]

1. BANKRUPTCY. *Preferences. Transfers. Necessity of Recording.*
Code 1906, Sec. 2787.

Under Bankruptcy Act July 1, 1898, Ch. 541, Sec. 60a, 30 Stat. 562, U. S. Comp. St. 1901, page 3445, as amended by Act Feb. 5, 1903, Ch. 487, Sec. 13, 32 Stat. 799, U. S. Comp. St. Supp. 1909, page 1315, invalidating transfers made within four months, and providing, that, if by law a transfer is required to be recorded, the period of four months shall not expire until four months after recording; a deed of trust, made more than four months before the grantor filed a petition in bankruptcy, but recorded within four months, is not void since under Sec. 2787, Code of 1906, an unrecorded deed of trust is valid as between the parties thereto and as against creditors and hence is not such an instrument, within the meaning of the bankrupt law, as is required by the laws of this state, to be recorded.

ON SUGGESTION OF ERROR.

2. BANKRUPTCY. *Preference. Mortgage. Avoidance by Bankrupt.*

Even though Code of 1906, Sec. 2787 is a law by which recording a mortgage is "required" within Bankrupt Act, July 1, 1898, Ch. 541, Sec. 60a, 30 Stat. 562, U. S. Comp. St. 1901, page 3445, as amended by Act Feb. 5, 1903, Ch. 487, Sec. 13, 32 Stat. 799, U. S. Comp. St. Supp. 1911, page 1506, so that such mortgage though given more than four months before the filing of the petition in bankruptcy having been recorded within such period, may be avoided, notwithstanding there are only general creditors of the bankrupt; yet authority to avoid a preference, and recover the property, being given by section 60b, only to the trustee in bankruptcy, the bankrupt having made a composition settlement with his other creditors and been discharged without the mortgagee having proved his claim, or his mortgage being questioned, cannot, by reason of the bankrupt law, attack the mortgage and the sale thereunder.

3. SAME.

In such case if the mortgage was fraudulent and obtained at a time when the grantor was insolvent and for the purpose of

obtaining a preference, then he was equally at fault with the grantee, and a court of equity will refuse him any affirmative relief when he seeks to have the mortgage cancelled.

APPEAL from the chancery court of Newton county.

HON. SAM WHITMAN, JR., Chancellor.

Suit by F. O. Horne against the Laurel Oil & Fertilizer Company and others. From a judgment overruling a demurrer to the bill, defendants appeal.

On December 4, 1907, appellee executed and delivered to the Laurel Oil & Fertilizer Company a deed of trust covering certain land in Newton county to secure an indebtedness then past due, for which he then executed a note due March 1, 1908. This deed of trust was not filed for record until April 8, 1908. On April 23, 1908, the land embraced in this trust deed was advertised for sale by the trustee (W. L. Wilson); default in the payment of the note having been made. On April 30, 1908, the appellee filed a voluntary petition in bankruptcy, and on May 8, following was adjudicated a bankrupt, and a trustee was duly appointed to take charge of the bankrupt estate. Said trustee immediately obtained a temporary restraining order to prevent the trustee in the deed of trust from making a sale of said land. The Laurel Oil & Fertilizer Company filed a demurrer to the petition of the trustee, upon which the restraining order had been obtained; but no further steps seem ever to have been taken. The claim of the Laurel Oil & Fertilizer Company was scheduled in the bankrupt proceedings as a secured claim. The regular notices were published in bankruptcy proceedings, and after the expiration of one year the Laurel Oil & Fertilizer Company had not proven its claim against the bankrupt estate. Afterwards a composition with creditors was effected, and on the 4th day of November, 1909, the appellee received his discharge in bankruptcy. Thereafter on March 25, 1910, the trustee in the deed of trust (W. L.

Wilson) proceeded to sell the land under the deed of trust, and same was purchased by K. C. Hall.

Thereafter on June 18, 1910, Horne filed his bill in the chancery court against the Laurel Oil & Fertilizer Company, Hall, and Wilson, setting out the foregoing facts, and alleging that at the time the deed of trust was executed appellee was insolvent, and this fact was known to the Laurel Oil & Fertilizer Company, who had requested the execution of the note and deed of trust, which was procured in order to secure a preference over other creditors of appellee; that such deed of trust was invalid, since it was not filed for record four months before the adjudication of appellee as a bankrupt; and that the claim was barred, because it was not proven against the bankrupt estate within one year, and was no longer binding and legally enforceable; and praying for the cancellation of the trustee's deed to Hall as a cloud upon appellee's title. The appellants demurred to the bill, the demurrer was overruled, and an appeal granted to settle the principles of the case.

Sec. 60a of the Bankrupt Act (Act July 1, 1898, Ch. 541, 30 Stat. 562 [U. S. Comp. St., 1901, p. 3445]), as amended by Act Feb. 5, 1903, Ch. 487, section 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, p. 1315), reads as follows: "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property; and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

Sec. 2787 of the Mississippi Code of 1906, is as follows: "All bargains and sales, and all other conveyances whatsoever of lands, whether made for passing an estate of freehold or inheritance, or for a term of years; and all instruments of settlement upon marriage, wherein land, money or other personalty should be settled or covenanted to be left or paid at the death of the party, or otherwise; and all deeds of trust and mortgages whatsoever, shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they be acknowledged or proved and lodged with the clerk of the chancery court of the proper county, to be recorded in the same manner that other conveyances are required to be acknowledged or proved and recorded; but the same as between the parties and their heirs, and as to all subsequent purchasers with notice or without valuable consideration, shall nevertheless be valid and binding."

Pack & Montgomery, for appellant.

If it be once admitted that this instrument was filed more than four months before the filing of a petition in bankruptcy or that it was not required by the statute of the state of Mississippi to be filed for record, appellee's suit immediately fails under the Bankruptcy Acts and allegations of appellee's bill. There can be no question on the part of the appellee that he knew of the existence of said trust deed, for he admits executing it for more than four months before the filing of his petition in bankruptcy. There is absolutely under the laws of the state of Mississippi, no necessity for the filing of this instrument for record so far as appellee's interest therein and liability thereon is concerned. The only purpose which filing for record serves, is that of giving notice to persons who have no notice of the execution of an instrument. Code of 1906, Sec. 2787, declares that instruments required to be recorded are valid and bind-

ing between the parties and their heirs without recording.

The law of bankruptcy declares this kind of instrument valid as between the bankrupt and the mortgagee.

In the third edition of Loveland on Bankruptcy, page 587, the above principle is announced in the following words:

“A mortgage, otherwise valid, may be void as a lien because it constitutes a preference in the bankruptcy. This is so, not because such mortgages are fraudulent at common law or by the statutes of the state, or are immoral or dishonest, but simply because the statutes say they are voidable. Such mortgages are valid as between the mortgagee and the bankrupt. A trustee, taking only the title of the bankrupt, could not attack their validity, except as power is expressly given him by the Bankrupt Act.”

Then it follows that if appellee had no standing in a court of equity and was estopped from maintaining his said bill that the lower court erred in overruling the demurrer of appellant to said bill.

Baskin & Wilbourn, for appellant, filed an elaborate brief too long for publication.

Flowers, Alexander & Whitfield, for appellee, filed an elaborate brief too long for publication.

Argued orally by *R. E. Wilburn*, and *G. Montgomery*, for appellant.

Argued orally by *J. D. Stewart*, for appellee.

SMITH, J., delivered the opinion of the court.

If the deed of trust in question was valid under the laws of this state and under the bankrupt law, its lien survived the discharge of the bankrupt, and the purchaser at the foreclosure sale acquired a valid title to the property therein described. Its validity under the state law is not, and could not be, seriously questioned.

It was executed more than four months prior to the filing of the petition in bankruptcy; but, since it was recorded less than four months prior to the filing of this petition, it was invalid under the bankrupt law, if by the laws of this state it was required to be recorded. Under Sec. 2787 of the Code of 1906, as construed in *Loughridge v. Bowland*, 52 Miss. 546, an unrecorded deed of trust is valid as between the parties thereto and as against general creditors and consequently a deed of trust is not such an instrument, within the meaning of the bankrupt law, as is required by the laws of this state to be recorded. *Meyer Bros. Drug Co. v. Pipkin Drug Co.*, 136 Fed. 396, 69 C. C. A. 240.

The decree of the court below is reversed, and the bill dismissed.

Dismissed.

OPINION ON SUGGESTION OF ERROR.

MAYES, C. J.

This case was disposed of at a former sitting of the court, but is again called to our attention through the medium of a suggestion of error. The case comes to the court on appeal allowed by the chancellor to settle the principles of the case, the chancellor having overruled a demurrer to the bill of complaint filed by F. O. Horne, appellee.

On the first hearing of this case, this court was of the opinion that the lower court should have sustained the demurrer and dismissed the bill, and we accordingly so ordered. In the former opinion of the court we took the view that the note and trust deed to secure same was valid as between the parties and all others except "creditors and subsequent purchasers for a valuable consideration without notice," though not lodged with the chancery clerk of the proper county for record. Sec. 2787, Code 1906. There was no claim by any person that the

rights of any "subsequent purchaser for a valuable consideration" were involved in any way, and therefore the only persons who could complain were "creditors." But this court held in the case of *Loughridge v. Bowland*, 52 Miss. 546, that the word "creditors" in the above statute meant only those creditors who had obtained a lien, and, since there were no such creditors, we held in the former opinion that, because the trust deed in question was executed more than four months prior to the voluntary petition in bankruptcy, it was a valid transaction under the state law, and hence a valid transaction under Sec. 60b of the bankrupt law, though not actually recorded until a few days before the adjudication in bankruptcy. In addition to the state authorities cited, this court cited the case of *Meyer Bros. Drug Co. v. Pipkin Drug Co.*, 136 Fed. 396, 69 C. C. A. 240. We recede from the legal conclusion announced by the court in its former decision and sustain the suggestion of error as to the law announced by that opinion, not because we are convinced that the court was wrong, but because the case can be decided on another ground. We are unable to find any case showing that the United States Supreme Court has ever decided the question involved in the original opinion, and the Circuit Courts of Appeals are in hopeless conflict on it. In the Circuit Courts of Appeals there are two distinct lines of authorities announced. One line of authority sustains the view announced by the case of *Meyer Bros. Drug Co. v. Pipkin Drug Co.*, 136 Fed. 396, 69 C. C. A. 240, which is that if a transfer is made prior to four months before an adjudication in bankruptcy, which is good as between the parties and as against general creditors without being recorded, such transfer is good under the bankrupt law, although such transfer is declared by the state law to be "absolutely void as against the creditors of the mortgagor or person making the same, and as against subsequent purchasers and mortgagees or lien

holders in good faith, unless such instrument, etc., be filed in the office of the county clerk," etc. In short, the above authority holds that under the bankrupt law no class of creditors can complain of the failure to record a transfer or mortgage, save those that are protected by the state law. This authority is followed in the circuit courts of appeals in the cases of *Eppstein & Co. v. Wilson*, 149 Fed. 197, 79 C. C. A. 155, and *In re Sturtevant*, 188 Fed. 196, 110 C. C. A. 68. The following cases in other United States Circuit Courts of Appeals (Judge Lurton, now Associate Justice of the Supreme Court of the United States delivering one of the ablest opinions on the subject) hold that, where a state statute requires a conveyance or transfer to be recorded in order to be effectual against any class or classes of persons, is a law by which such recording is "required" within the meaning of the bankrupt law which defines preference given by a debtor within four months prior to his bankruptcy, and provides that "when the preference consists in such a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required." *Loeser v. Savings Deposit Bank & Trust Co.*, 148 Fed. 975, 78 C. C. A. 597, 18 L. R. A. (N. S.) 1233; *Rasmussen v. McKey*, 177 Fed. 141, 100 C. C. A. 561; *First National Bank v. Connett*, 142 Fed. 33, 73 C. C. A. 219, 5 L. R. A. (N. S.) 148; *Mattley v. Giesler*, 187 Fed. 970, 110 C. C. A. 90. The weight of authority seems to be against the view of the court as announced in the original opinion.

But what merit is there in this case so far as appellee is concerned? Let us examine his allegation of fact in the bill of complaint. It is unnecessary to pursue the statement of fact set forth in the bill in detail. We shall content ourselves with merely summarizing the main facts alleged in the bill. It appears from the complaint filed by appellee that he states that on December 4, 1907,

he was indebted to the Laurel Oil & Fertilizer Company on open account in the sum of one thousand four hundred and eighty-three dollars and four cents. In order to secure the payment of this debt, and on the date above stated, appellee executed to the fertilizer company a note secured by a trust deed on certain lots in the town of Union, Newton county. This trust deed was not filed for record until April 8, 1908, more than four months from the date it was given. On May 1, 1908, less than a month after the trust deed was filed, appellee filed a voluntary petition in bankruptcy, and was duly adjudicated a bankrupt under the federal laws. When appellee filed this voluntary petition in bankruptcy, the fertilizer company's claim was listed by him as a secured claim in his schedule of liabilities. This appears in the bankruptcy proceedings which are made an exhibit to the bill. It sufficiently appears from the bill of complaint that the fertilizer company had all the notice of the bankruptcy proceedings which the law required to be given to creditors. It is also shown by the bill of complaint that the fertilizer company made no effort to prove its claim, but rested upon its supposed legal rights as a secured creditor. At the time this bill was filed, it is shown that the time within which claims of general creditors might be proved had more than expired. The bill of complaint shows that after appellee was declared a bankrupt, and some time in 1909, appellee effected a composition settlement with his creditors, but the fertilizer company was not a party to this composition settlement; that is, it does not appear in the bill that the fertilizer company agreed to surrender any part of its securities or accepted any benefit under the composition. After the composition was effected, the bill of complaint alleges that the appellee received a discharge in bankruptcy, which, it is alleged, authorized him to be placed in charge of his own affairs with the right to use and dispose of his property at his own volition, and the appellee alleges

in the bill that the discharge released appellee from all liability on account of the indebtedness due to the fertilizer company, and it is alleged that this note and security became void and unenforceable from the date of the discharge. Appellee then alleges that notwithstanding this, on March 25, 1910, the trustee in the trust deed referred to above attempted to foreclose the trust deed for the purpose of collecting the debt secured by it, and it is charged that a sale of the lots in question was actually made in Decatur and the property purchased by one K. C. Hall, who had full knowledge of all the facts and circumstances relied upon to vacate the sale. The bill alleges that this sale was invalid, and passed no title.

Appellee further alleges in the bill that the object of the fertilizer company in taking the security in December, 1907, was to obtain a preference and protect and secure itself in this preference over other creditors. Appellee then charges that at the time he gave the trust deed to appellant he was insolvent and had been for many weeks, and that this fact was known to the fertilizer company at and prior to the time it took the note and trust deed. The appellee seeks by this bill to have the trustee's deed to Hall canceled as a cloud upon his title. It is our judgment that the bill of complaint entirely fails to state any cause of action, and the demurrer should have been sustained and the bill dismissed. There are many reasons why appellee cannot succeed, and we will proceed to state them.

In the first place, we have seen that it was not necessary for this trust deed to be recorded in order to make it valid as between the parties and as against the general creditors of appellee. See Sec. 2787 of the Code of 1906, and *Loughridge v. Bowland*, 52 Miss. 546. In this case all the creditors were general creditors, and therefore, under the laws of this state, the transfer or mortgage was a valid one. If it could have been avoided at

all, it could have been avoided only by the trustee in bankruptcy by a direct suit for that purpose and no such suit was ever instituted either by the trustee or any creditor, but the mortgage was treated as a valid security. Sec. 60b of the bankruptcy laws provides that, if a preference shall have been given by a bankrupt, etc., "it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as herein before defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." We see from the above that even though this be considered a preference under the bankrupt law, since it is valid under the state law, the mortgage is not void, but voidable at the suit of the trustee; and if no such suit is brought either by the trustee, or, in the event of his refusal to act, then by one of the creditors, then the transaction remains valid, and surely the bankrupt who participated in creating the fraudulent preference can never be heard in any court to complain of the invalidity of the mortgage. The very reason of the law in declaring a preference void is for the benefit of creditors and not the bankrupt, and, if the creditors do not care to complain, it is difficult for us to understand by what principle of equity the bankrupt can hope to have himself relieved from the liability which he has created in fraud of others' rights. On page 665 of Collier on Bankruptcy, he says that preferences under the bankrupt law are not void, but voidable. When a preference is given, title passes, and before it is set aside a recovery must be had. Again, the same authority says on page 672: "Subsection 'b' provides that a preference is voidable by the trustee, and he may recover the property or its value. There is no authority in any one else to maintain the required action. Any other rule, even were the statute not clear on this point, would lead to confusion.

The right of a trustee to recover a preference is not assignable. But, if the trustee refuses to sue, it has been held that a creditor may be permitted to do so for the benefit of all." The bill clearly shows that the appellant simply relied upon its security, and was satisfied with it. If the security was voidable under the bankrupt law, it was voidable at the instance of the trustee and for the benefit of the creditors, and was a valid security until it was assaulted by the proper parties. It could not have been attacked by the bankrupt, and, until assaulted by the proper parties, the holders of the security could rely upon it as a valid security, and were entitled to all the rights and privileges of secured creditors. One of these privileges was that the claim need not be proved in order to keep alive the right of appellant to enforce its security. Under the facts of this case, the bankrupt law held it intact, and it lived through the proceedings without being weakened or destroyed.

In Loveland on Bankruptcy it is stated that "a secured creditor may rely upon his lien and neither prove his debt in bankruptcy nor release his security. In such case the security is preserved, notwithstanding the bankruptcy of the debtor." This statement of the law is again repeated in the same book on page 1098. If this is true, it follows that the discharge in bankruptcy had no bearing on this security. See section 469, *et seq.* If it be argued that this was no lien because it could have been avoided by the trustee, we answer that it was good until avoided, and it was never avoided, and therefore this mortgage is to all intents and purposes a valid mortgage and as such it is to be treated in this case as between the parties litigant.

We have shown from the above authorities that this mortgage was a valid mortgage under the state law as between the parties and all general creditors. We have also shown that, being valid under the state law as to

general creditors, it was valid under the bankrupt law until avoided by the trustee. In other words, if it could have been assailed under the bankrupt law, it must be assailed as a voidable, and not a void, instrument. We have also shown that the discharge of the bankrupt did not affect this security, since, if voidable, both trustee and creditors treated it as a valid security. In this view of it, we cannot understand on what principle of law or equity appellee hopes to secure a cancellation of the mortgage in a court of equity. In so far as the rights of appellee are concerned, they are to be determined just as if no bankruptcy proceedings had ever been instituted. When appellee instituted this suit in the equity court for the purpose of canceling this mortgage, he must stand upon the merits of the case made by the bill, and the extent of his rights are to be measured and controlled by the ordinary maxims and rules of equity unaffected by the bankruptcy proceedings. When he does this, there is no merit in the bill. In the first place, the bill of complaint states no cause of action, when we consider the bill without reference to the equitable estoppel that its face discloses as to appellee. Again, if the mortgage was fraudulent and obtained at a time when appellee was insolvent and for the purpose of obtaining a preference, then appellee was equally at fault with appellant, and a court of equity would refuse him any affirmative relief when he seeks to have the mortgage canceled. Again, if the mortgage was given as a preference by appellee to appellant, as the bill shows, for the purpose of taking an advantage of the general creditors, it was as much a wrong on the part of the person giving the mortgage as it was on the part of the one taking it, and a court of equity will aid neither to obtain any advantage of his wrong thus participated in. Both under the bankrupt law and under the general rules of equity this appellee has no standing in court, and it follows that, while we place the decision on a

different ground from that announced in the former opinion, the disposition of the case must be the same, and the decree of the lower court overruling the demurrer to the bill of complaint is reversed, the demurrer to the bill sustained, and the bill dismissed.

Reversed and the bill dismissed.

E. M. ODOM v. GULF & SHIP ISLAND RAILROAD
COMPANY.

[57 South. 626.]

1. RAILROADS. *Injury to Persons at Station. Duty of Agent. Pleading. Construction. Judgment. Default. Pleading to Sustain.*

A railroad owes no duty to the public to supply general peace officers for the state. The agents of public carriers are placed in its depots for the purpose of aiding and assisting in the discharge of its public duties. When a person seeks to claim protection from insult and abuse, and to hold a railroad company liable for failure to give protection, such person must prove that he was at the depot for the purpose of transacting some business with the agent in connection with the service he is to render the railroad company in discharging its duty to the public in the business in which it is engaged.

2. RAILROADS. *Injury to Persons at Station. Duty of Agent.*

In a suit against a railroad company for a failure of its station agent to protect plaintiff from insult and abuse, a declaration which does not state that plaintiff went to the depot to see the agent on any matter connected with the business of the company but simply alleges that he "went to the depot for the purpose of transacting business with the agent of defendant" fails to state a cause of action.

3. SAME.

The universal rule of pleading is that pleadings are to be construed most strongly against the pleader and no judgment by default should be rendered where the declaration wholly fails to state any cause of action.

4. RAILROADS. *Injuries to Persons at Station. Duty of Agent. Code 1906, Sec. 4867.*

Sec. 4867, Code 1906, is not intended to make the depot agent a general officer of the state. The authority conferred upon them by this section is intended for use as the agents of the railroad company, to enable them more completely to discharge the duty that rested on the railroad company, before the enactment of the statute to protect any member of the public who goes to the depot to transact railroad business.

APPEAL from the circuit court of Simpson county.

HON. W. H. HUGHES, Judge.

Suit by E. M. Odom against the Gulf & Ship Island Railroad Company. From a judgment sustaining a demurrer to the declaration, plaintiff appeals.

The declaration omitting formal parts, is as follows:

“On or about the 17th day of April, 1910, the defendant was a Mississippi corporation, doing business as a railroad company, and in the operation of its railroad it had depots up and down its line of railroad, and agents at said depots, or stations, with whom the general public would go and transact their business with the defendant. There was a depot in the town of Star, in Rankin county, Mississippi, where the plaintiff lived, and the said depot was in charge of an agent of the defendant, and under and by the laws the said agent at Star was a conservator of the peace, and it was his duty to preserve the peace, and to protect all persons coming to the depot to transact business with the defendant from insults and abuse and attacks, especially when such persons appeal to the agent for such protection. On or about this day the plaintiff went to the depot, at Star, of the defendant, for the purpose of transacting business with the agent of the defendant, and when the plaintiff arrived at the depot the section foreman in the employ of the defendant met plaintiff at the door, and cursed, abused, maltreated, and insulted the plaintiff in the presence of the depot agent, or depot master, who was also the agent of the defendant, and while said

insults, abuse, cursing, and maltreatment was heaped upon the plaintiff by this section foreman, plaintiff appealed to the station master, or the agent of the defendant, who was in charge of the depot, for protection. The said agent in charge of the depot stated that he would have nothing to do with it, and refused to protect plaintiff from such insults, abuse, cursing, and maltreatment, or to cause the other servant of the defendant, the section foreman, to desist from his cursing, abusing, and maltreating plaintiff. The plaintiff charges that the railroad company owed the duty to the public to employ competent servants in each and every capacity; that by having in its employment as the section foreman a species of moral degenerate and a drunken sot, a man who had no regard for the rights of the general public, who would approach the stations of his master, to transact business with his master, the defendant violated the duty that it owed to the public in having this kind of servants in its employment. Plaintiff avers, further, that the defendant owed to the general public the duty to have in its employment as station masters, or depot agents, servants competent in every particular, whose moral courage would enable them to protect people, coming to the depot on business, from ruffians and drunken desperadoes, and who would protect the general public, transacting business with the defendant, from abuse, cursing, and insults; but the defendant violated this duty that it owed to the general public, in having in its employment an incompetent servant and station master, or depot agent. Plaintiff avers, further, that it was the duty of the depot agent of the defendant to protect him from this abuse, cursing, and maltreatment, made so by his employment of the defendant; but the defendant's agent or servant, and the defendant itself, has been grossly and willfully negligent in performing those duties that it owed this plaintiff and the general public; and by reason of said gross and willful negli-

gence of the defendant, the plaintiff has been greatly damaged and humiliated and mistreated, to-wit, in the sum of five thousand dollars. Wherefore he brings this suit and demands judgment.”

Hilton & Hilton and Flowers, Alexander & Whitfield,
for appellant.

Sec. 4867 of the Code makes it the duty of the railroad companies to keep open their stations at least an hour before the arrival and one half hour after the departure of passenger trains and to keep the station lighted when necessary, and also properly heated. And then it is provided:

“The agent or person in charge shall preserve order and, if necessary, eject any person whose conduct is boisterous or offensive.”

It is said, however, that this section was enacted for the benefit of passengers only and that there is no duty resting upon agents at stations to keep order or to protect any person in or about the station except passengers or persons who are there for the purpose of becoming passengers. In other words it is said that the agent cannot be considered a conservator of the peace in and about stations except insofar as he may have to deal with passengers or except so far as passengers, as such, may be concerned.

In *King v. Railroad Co.*, 69 Miss. 245 the court said:

“Every depot or station agent, whatever may be his instructions or understanding, is made a conservator of the peace with authority to preserve order in the waiting room, and the duty to arrest and deliver to some officer all persons who are guilty of disorderly conduct, etc. The manifest purpose of the legislature was to secure the preservation of order in the waiting room through the designated officer or agent of the railroad company, and what he does or fails to do, in reference to this duty, is imputable to the railroad company as its act or omission.”

We do not understand that it would have made any difference in the decision of the King case if it had appeared that King was not a passenger but was rightly on the premises of the company. The decision is not made to depend upon the fact that he was a passenger or intending passenger, and while it is said that the statute was intended to make a station agent a conservator of the peace in and about the waiting room, it certainly would not be given such limited application as to relieve the station agent of the duty to preserve order in any part of the station which was under his supervision or control nor do we think that it would be given such limited application as to afford protection to passengers only.

Passengers are entitled to the protection because they are rightly on the premises of the company. They have in a way put themselves in the hands of the company and sufficient authority is vested in the station agent to protect them. And while the passenger may be under a contractual relation with the company this could hardly be considered to do more than to establish his right to remain on the premises and depend upon the company for protection while he so rightfully remains there and properly conducts himself. But the man who goes to get freight which the company has transported for him or to deliver goods to be transported is also in a contractual relation, in a sense, with the company and his right to be on the premises and to be protected while there is established. The material inquiry is whether the person claiming the protection was rightly on the premises or necessarily there in order to transact business which he has with the company.

In *Andrews v. Railroad Company*, 86 Miss. 129, wherein it appeared that Andrews had gone to the station long before train time and by the courtesy of the agent was permitted to go into the agent's private office to do some writing and was there assaulted by the agent, the court said:

“We hold that every prospective passenger or other person lawfully entitled to use the reception room at a passenger station, and whose own conduct is not boisterous or offensive, is protected in such use by the provision of the section cited. But the statute cannot be so extended as to cover a difficulty of a personal nature, not growing out of or connected with the services of the employee or the business of the master, arising between two individuals not in the reception room, even though one of the parties should be an employee of the railroad company owning or controlling the depot.”

But in that case it appears that there was no business of the master being transacted or about to be transacted by either of the parties. Andrews was not on the premises for any purpose except a private purpose. He was there for his own business and the company owed him no duty whatever to protect him. He was not there to transact business with the railroad company.

In *Rose v. L. N. & O. T. R. R. Co.*, 70 Miss. 725, the court held that the railroad company may be liable for the act of persons expelling the plaintiff from the waiting room with unnecessary violence, since it was made to appear that the agent of the defendant directed or permitted it and no reference is made in the opinion of the court or in the brief of counsel to the statute. *Rose*, however, seems to have been a passenger.

B. E. Eaton and May & Sanders, for appellee.

Counsel for appellant do not undertake to predicate liability against the defendant for the act of the section foreman, except insofar as the station agent failed to protect plaintiff when appealed to. In other words, it seems to be admitted by counsel for appellant that the section foreman was not acting in the scope of his duties, service and employment; and they do not insist that there would be liability, if it had not been for the failure of the station agent to protect plaintiff. In fact, counsel

for appellant cannot contend that liability is fastened on defendant by the act of the section foreman alone, since they do not contend that, at the time he was acting for the master and within the scope of his employment, and since they decline to amend their declaration so as to contain this allegation. The decisions of this court to this effect have been numerous, but we wish to cite the court to the two leading cases: *Railroad Company v. Latham*, 72 Miss. 32, and *Canton Warehouse Co. v. Pool*, 78 Miss. 147.

Counsel for appellant, however, proceed upon the theory and the assumption that the allegations in the declaration to the effect that plaintiff went to the depot to transact business with the agent of the defendant, is equivalent to the allegation that he went to the depot to transact business with the defendant and they have assumed throughout their discussion that it is alleged that plaintiff went to the depot to transact business with the defendant.

Consequently appellant's counsel maintain that they may rely upon, either statutory enactment or common law authority, to the effect that it was the duty of the agent, under such circumstances, to protect plaintiff from insult and abuse. However, throughout the declaration the complaint is that it was the duty of the agent to intervene because he was a conservator of the peace. It is not pretended in the declaration that the station agent was under any obligation to intervene except as a conservator of the peace, and he can only be a conservator of the peace by virtue of Sec. 4867, Code 1906, which confers on him that power. It cannot be contended that he is a conservator of the peace by virtue of any common law or decision.

The supreme court of Mississippi has practically decided that, but for the statutory requirement, the station agent owed no duties whatever to act as conservator of the peace.

In the case of *King v. Railroad Co.*, 69 Miss. 245, Chief Justice Campbell, in discussing the act of February 22, 1890, making it the duty of station agent to act as conservators of the peace, says:

“The act cited creates the power and the duty prescribed to be exercised and performed by depot or station agents, as such, and for their principles. Under the act they are neither more or less than depot or station agents, with the additional power and duties prescribed by it, to be exercised and performed for and in behalf of their employers.”

This language clearly shows that the court would not have recognized any common law liability upon the railroad company for the failure of a station agent to preserve peace, even in the waiting room containing passengers. If, as stated by Judge Campbell, the act created the power to be exercised, a failure to exercise the power in the absence of the act would be impossible and would consequently create no liability upon the railroad company. The act referred to above has been brought forward and finds its present form in Sec. 4867 of the Code. If, as stated above, these agents are neither more nor less than depot or station agents with the additional powers and duties prescribed by the act to be exercised and performed for and in behalf of their employers, it obviously is not their duty, as station agents, to act as conservators of the peace, except in those particular instances where the statutes require it.

Section 4867 has reference only to reception rooms for passengers, prescribing how long they shall be kept open; prescribing how they shall be kept, and concludes with the language that: “The agent or person in charge shall preserve order, and if necessary eject any person whose conduct is boisterous or offensive.”

Plainly, the duty of the agent has reference only to the subject comprehended in the section and these subjects deal solely with the conveyance, comfort and pro-

tection of the passengers. King was a passenger; was within the passenger waiting room of the railroad company and thus came strictly within the provisions of the act. The noticeable feature in the present law that differs from the act of 1890, is that the act of 1890 provides that station agents shall arrest and deliver to the custody of the most convenient sheriff or proper officer, the offending person. The present statute does not require the station agent to make any arrests whatever, putting as the alternative for the inability to preserve peace, the provision that the offending person may be ejected from the depot; consequently, the obligation upon a station agent at present, is less binding than it was when King was improperly arrested, and the power given to a station agent to interfere even in proper cases is, accordingly, more circumscribed.

If, therefore, the original act was only meant to apply to passengers, certainly the present act cannot be made to comprehend additional persons, whether they go to the depot to transact business with the defendant or whether they go to the depot for personal and private reasons. Counsel are, therefore, mistaken in stating that the decision in the King case is not made to depend upon the fact that King was a passenger or an intending passenger.

We also submit that counsel for appellant was mistaken in their assertion that the same rule that prevails for the protection of passengers should prevail for the protection of persons going to the depot to transact other or different business. At most, such persons would be nothing more than licensees invited upon the railroad premises and no rule of law that we have found holds a carrier liable to such persons to the same extent as it is held liable to a passenger. If the railroad company is liable to plaintiff, assuming that the plaintiff went to the depot to transact business with the defendant, this liability must arise because of the breach of some duty

owed to plaintiff as a carrier. What breach of duty is shown in the declaration? What kind of business does the declaration show that plaintiff went to the depot to transact, assuming that the plaintiff went to the depot to transact business with the defendant? Does he state in his declaration that he went to the depot to look after a freight transaction? Does he contend that he went to the depot in pursuance of any business between him and the defendant growing out of the relation of a common carrier? So far as the declaration discloses, if plaintiff's business was intended to be a business with defendant, it might have been for the purpose of endeavoring to sell the defendant merchandise; it might have been to seek employment; it might have been to procure the discharge of someone; it could have been for numerous purposes which do not involve in any degree the duties of a carrier, and which do not to any extent entitle plaintiff to any extra protection offered by the law to one transacting a business with the defendant as a carrier of passengers and freight. Counsel for appellant are not warranted in the assumption that the plaintiff went to the depot to get freight, and they are not entitled to discuss appellant's rights as if he had gone there for freight. The appellant is as silent as to the character of business he went to transact as he is careful to state that his business was with the agent of the defendant and not the defendant itself.

We do not understand that counsel have successfully escaped the holding of the court in the case of *Andrews v. Railroad Co.*, 86 Miss. 129. It clearly appears in this case that the court limits the liability of a railroad company for the wrongful or tortious acts of its agent to those persons who are in or about the depot for the purpose of becoming passengers. Andrews did not go to the depot to immediately become a passenger on the train, and the court held that, Sec. 4313, Code 1892, had no application to this case. Andrews was not injured

by the failure of an agent to prevent another from assaulting him, but he was injured by the direct assault by the agent himself.

If, independently of section 4867, there is any common law liability for the failure of an agent to prevent another from doing a wrong, it seems that the court would have held in the *Andrews* case, that the road was liable for the agent's wrongful conduct.

However, the court in discussing Sec. 4313 of the Code of 1892, which was brought forward as 4867 of the present Code, uses the following language: "That section was intended to conserve the convenience and comfort of the traveling public, first, by providing comfortable and cleanly rooms for their reception and accommodation; and, second, by protecting them from boisterous and offensive conduct from others. This section attempts to achieve the desired end by imposing it as a positive duty on all railroad companies at every passenger station to keep open, under the conditions and for the time stated therein, cleanly, warm and properly lighted rooms, and by vesting the person in charge of such rooms with necessary power as a conservator of the peace. But appellant at the time of the difficulty of which he now complains, though in fact due to his own responsible language and aggressive conduct, was not in the room so prepared, but in another part of the depot building, into which he had gone in furtherance of his personal ends, and in wilful disregard of an established rule of the appellee."

In another portion of the opinion in the *Andrews* case, *supra*, the court says: "nor was he at the time of the occurrence in any place prepared or intended for the accommodations of passengers."

The court seems to recognize by this remark and the remark subsequent to it, contained in the first quotation, that not only is the special duty to abide by this statute intended for a passenger, but that the passenger must at the time be in the place prepared for the accommodation

of passengers. This certainly is a reasonable requirement. If the law is to make a general police officer of an agent of the railroad company and require this agent to exercise the functions of a police officer continuously about the station, it is perfectly apparent that the agent could not give proper or suitable services to the master, or attend properly to the duties of the station. Undoubtedly all that the law intended was, that when people have gathered at the station as passengers, it is proper that they should be protected against violence or insult.

The plaintiff showed by his declaration that he never got within the station or waiting rooms at all. He simply states that he was met at the door. It does not appear whether the door was a door to the waiting room, to the agent's private office, or the door to the freight warehouse. Neither does the declaration allege as has been before stated, that the agent was himself within the depot or waiting room, nor that the section foreman was in the waiting room. Consequently, the plaintiff fails to allege that the station agent was where; under the law, he had jurisdiction to act as a conservator of the peace. And he fails to show any circumstances under which the agent was any more called upon to interfere in a personal difficulty between him and the section foreman than any other person not an agent of the railroad company.

Argued orally by *J. N. Flowers*, for appellant.

Argued orally by *B. E. Eaton*, for appellee.

MAYES, C. J., delivered the opinion of the court.

On the 28th of January, 1911, E. M. Odom brought a suit against the Gulf & Ship Island Railroad Company, in which he sought to recover five thousand dollars damages for the failure of the depot agent to protect him from alleged abuse and maltreatment by a section fore-

man of the above railroad. It would be hardly worth while to set out the declaration at length. We shall only set out the substance of the complaint as stated in the declaration. The declaration states that about the 17th of April, 1910, Odom went to the depot of the Gulf & Ship Island Railroad Company, located at Star, for the purpose of transacting "business with the agent of the railroad company," and, on arriving at the depot, a section foreman employed by the railroad company met him at the door, and cursed, abused, insulted, and maltreated him in the presence of the depot agent. It is alleged that Odom appealed to the station master for protection, but the station master refused to have anything to do with the affair, and refused to attempt to protect Odom from insults, abuses, etc., or to attempt to cause the section foreman to desist. The declaration then alleges that the railroad company owes the duty to the public to employ competent servants in every capacity, and that having in its employ a section foreman who was a moral degenerate and a drunken sot, having no regard for the rights of the general public resorting to the station of his master to transact business with his master, was a violation of the duty the railroad company owed the public. The declaration further alleges that the railroad company owes the duty to the public to have a station master competent in every respect, and with moral courage sufficient to enable him to protect people coming to the depot on business, from ruffians and drunken desperadoes, and that the railroad company failed in this, and was grossly and willfully negligent in performing the duties due to this plaintiff and the general public, to the plaintiff's damage of five thousand dollars. The declaration shows that appellant relies for his right to recover against the railroad company on the failure of the depot agent to protect him from insult and abuse, but wholly fails to allege any facts which show that the railroad company owed appellant

any duty whatever. This declaration was demurred to on several grounds; the main one being that it stated no cause of action. The lower court sustained the demurrer and dismissed the bill, and an appeal is prosecuted from this judgment.

The railroad company is engaged in the business of public carrier, and its agents are placed in the depot for the purpose of aiding and assisting in the discharge of its public duties. When a person seeks to claim protection from insult and abuse, and to hold a railroad company liable for failure to give the protection, such person must prove that he was at the depot for the purpose of transacting some business with the agent in connection with the service he is to render the railroad company in discharging its duty to the public as a common carrier. We are not prepared to say that the liability of the railroad is any different, whether the person claiming the protection shall have gone to the depot to have dealings with the agent as a common carrier of goods or passengers, or any other service which the railroad undertakes to render the public as a common carrier. Sometimes, and in some places, the railroad company runs a telegraph office in its depot for the use of the public. If a person go to the depot to send a telegram, such person in such a case, by reason of his contractual or intended contractual relations, possibly has the same right to claim the protection of the railroad company while at its depot for this purpose, as would a person going to the depot for the purpose of transacting business with it as a common carrier of freight or passengers.

But the declaration does not state that the appellant went to the depot to see the agent on any matter connected with the business of the company. The declaration merely alleges that appellant "went to the depot for the purpose of transacting business with the agent of defendant." But what character of business? Was

it private business with the agent? Had he gone there to procure employment? A declaration must state a cause of action. The only duty resting upon the railroad company was the duty to protect when the business which took appellant to the depot was in connection with the business of the company. A railroad company does not owe the duty to the public of supplying general peace officers for the state.

The universal rule of pleading is that pleadings are to be construed most strongly against the pleader. *McCerrin v. Railroad Co.*, 72 Miss. 1013, 18 South. 420; *Powell v. Stowers*, 47 Miss. 577; *Clary v. Lowry*, 51 Miss. 879. If appellant went to the depot to transact business with the railroad company as a public carrier, through its agent he should have so alleged, and stated what the business was. Failing to do this, he failed to state any cause of action. The facts alleged must show a duty, and a breach of that duty, before any liability can attach. Under the case of *Insurance Co. v. Keeton*, 95 Miss. 708, 49 South. 736, no judgment by default could have been taken in this case because it wholly fails to state any cause of action. If everything placed in the declaration be conceded to be true, there is no liability.

Sec. 4867 of the Code of 1906 is not intended to make the depot agent a general peace officer of the state. The authority conferred upon them by the above section is intended for use as the agent of the railroad company, to enable them more completely to discharge the duty that rested on the railroad company before the enactment of the statute to protect any member of the public who goes to the depot to transact railroad business. The case of *King v. Railroad Co.*, 69 Miss. 245, 10 South. 42, is decisive of the above statement of the law. The court, speaking through Judge Campbell, says: "We reject the view that depot or station agents of railroad companies are, by 'An act to amend the railroad super-

vision laws of this state,' approved February 22, made officers of the state, and its representative the exercise of the powers conferred, so as to release their principals from responsibility for their acts. The act cited creates the power and the duty prescribed to be exercised and performed by depot or station agents as such, and for their principals. Under the act they are neither more nor less than depot or station agents with the additional power and duty prescribed by the act to be exercised and performed for and in behalf of the railroad employers. The language of the act excludes the thought that they are made officers, for it provides that they shall 'arrest and deliver to the custody of the most convenient sheriff or constable, or other proper officer,' thus showing that the power devolved on them is to be exercised at their place of business and in their capacity as its supervisor. The act is a part of the scheme of railroad supervision by the state, and its effect in the matter now being considered is to make it the duty of the railroad companies, through their depot or station agents, to preserve order in the waiting rooms in their respective stations."

The case of *Andrews v. Railroad Co.*, 86 Miss. 12, 13 South. 773, is conclusive of the proposition that when a person goes to the depot on a private matter, and becomes involved in a difficulty about a private matter with the agent, the railroad company is not liable. In all the cases cited by counsel for appellant, where the court has held the railroad company liable for injury or abuse, the facts showed a duty on the part of the railroad company to protect by virtue of the actual or intended contractual relations with the railroad as a common carrier. In the case of *Rose v. L., N. O. & T. Co.*, 70 Miss. 725, 12 South. 825, 35 Am. St. Rep. 100, the appellant was a passenger. In the case of *Kranz v. Railroad Co.*, 12 Utah, 104, 41 Pac. 717, 30 L. R. A. 100, the appellant was a passenger, and the same is true in

cases of *Railroad Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689, and *Railroad Co. v. Minor*, 69 Miss. 710, 11 South. 101, 16 L. R. A. 627. *Affirmed.*

MCLEAN, J. (dissenting and concurring).

The reporter will set out in full the declaration in this cause. The defendant demurred to the declaration, and, the demurrer being sustained, plaintiff declined to amend, and prosecuted this appeal.

It is urgently insisted by appellee that the declaration shows that the plaintiff went to the depot, not for the purpose of transacting business with the defendant, but on private business with the agent of the defendant. It is true that the allegations of the pleadings are construed most strongly against the pleader, yet, when we examine the declaration as a whole, it is manifest that the plaintiff was at the depot for the purpose of transacting business with the defendant. Among other things the declaration alleges: "There was a depot in the town of Star, Rankin county, Mississippi, where the plaintiff lived, and the said depot was in charge of the agent of the defendant, and under and by the laws the said agent at Star was conservator of the peace, and it was his duty to preserve the peace and to protect all persons coming to the depot to transact business with the defendant. . . . On or about this day the plaintiff went to the depot, at Star, of the defendant for the purpose of transacting business with the agent of the defendant." It is not debatable but what the reasonable construction to put on this language is that the business to be transacted was not with the agent individually and on private business with the agent, but that the plaintiff went there for the purpose of transacting business with the defendant. If not, why did he say "for the purpose of transacting business with the agent of the defendant?" The expression, "agent of the defendant," must necessarily mean in the agent's representative, and not

in his individual, capacity. To allege that he went to transact business with the agent of the defendant is equivalent to saying that he went to transact business with the defendant through its agent. Further, when he went to transact business with the agent of the defendant necessarily implies that he did not intend to transact business with him as principal, but with him as agent.

The insufficiency of the declaration is this: It fails to allege the kind and nature of the business that called plaintiff to the depot. It should specify such business as the defendant under the law is required to perform, either by statute or common law. At first I was inclined to the opinion that the declaration under our statute was sufficient; but my brethren have convinced me otherwise, and I place my concurrence solely upon the ground that there is nothing in the declaration which discloses the particular business that called him to the depot. It may be that this business was such as required the defendant to protect him; but plaintiff should have set out this in the declaration. We cannot assume that he went to the depot for the purpose of transacting any particular kind of business. The declaration does not so state, and the allegations are construed most strongly against the pleader.

KATE TAYLOR v. WILLIS GARRETT.

[57 South. 658.]

MARRIAGE. *Sufficiency of evidence.*

In a case involving the validity of a second marriage, testimony of complainant and her son, that in 1878 her former husband was taken sick and carried to the county poorhouse at which time she left him; that she was afterwards informed that he had died; that she took the household effects; that she had never heard of him since and had never doubted his death; that she again married in the year 1883; was sufficient in the absence of any proof to the contrary to establish the validity of the second marriage.

APPEAL from the chancery court of Issaquena county.
HON. M. E. DENTON, Chancellor.

Bill in chancery by Kate Taylor against Willis Garrett. From a decree for defendant, complainant appeals.

Appellant filed her bill in chancery, alleging that Samuel Garrett and his brother, Willis Garrett, purchased and became tenants in common of certain land in Issaquena county. About the year 1893 Samuel Garrett died without issue, leaving, as the bill alleged, as his only heir at law, the appellant, his wife, now Kate Taylor. The bill alleges that the land is incapable of partition, and prays for a sale of same and distribution of the proceeds between herself and Willis Garrett. The bill alleges, further, that said land was sold for taxes one year, and it became necessary for the complainant to redeem same from tax sale, and that she had made demand upon the defendant for her part of the property of her deceased husband, and prays for an accounting for rents and profits, less whatever taxes were paid by defendant. The bill does not waive answer under oath. The defendant answered, denying generally all the allegations

of the bill, and he attempts to swear to the answer on information and belief.

On the hearing the testimony of the complainant, who testifies in her own behalf, as does her son, shows that some time prior to 1879 she was married to a man named Joshua Whitfield; that she left him about the year 1878, when he was taken sick, and carried to the county poor-house; that she was afterwards informed that he had died, and that she took what household effects had been theirs. Her son, who was a small boy at that time, corroborates her testimony. Neither of these witnesses saw Joshua Whitfield after his death, and no witnesses are produced who did see him. Afterwards, in the year 1883, appellant married Samuel Garrett. Appellant had never heard of Joshua Whitfield since his reputed death, and never doubted that she had been correctly informed as to his death. It was attempted to be shown, in cross-questioning these witnesses, that John Whitfield is not dead, and that appellant's marriage to Samuel Garrett was null and void; but no proof is offered by appellee. Appellant testifies that she lived on the land with Samuel Garrett and helped him clear it up, and that a short while before his death they had separated. The defendant below offered no testimony at all, other than the answer, which is attempted to be sworn to on information and belief, which is simply a general denial of all the allegations of the bill.

On the hearing the chancellor entered a decree dismissing the bill, from which comes this appeal.

W. E. Mollison, for appellant.

While we do not know, because the defendant did not introduce any evidence whatever, what his defense might have been, we infer from the line of questions asked that he wishes to attack the validity of the second marriage of the complainant herein, on the ground that the first husband was alive. We do not wish to more than call the

attention of this honorable court to the fact that the law presumes everything in favor of the validity of a marriage and so jealous of this on this score that it will presume a death in order to make valid a marriage. It is always incumbent upon him who seeks to overthrow the effect of a marriage to show the affirmative of his contention. When one asserts that he is the widower or late husband of a deceased or the widow of a man, who-soever would disturb or set aside this statement must affirmatively show that the marriage was either invalid when it was consummated, or that it had been terminated by death or divorce, or in some manner other than the mere presumption. If this was not the law the very fabric of society would be uprooted. It is necessary that the marriage state be presumed, for any other rule would work not only violence to sentiment, but would up set all property rights and put to the test of the brutal inquiry the most delicate relations of life.

Green & Green, for appellant.

The only evidence shows that appellant when about fourteen years old was married to one Joshua Whitfield from whom she was separated in the year following the yellow fever epidemic in 1878. At the time of the separation, Whitfield was ill and was carried away to the county poorhouse by a constable. These facts are proven by two witnesses, and furthermore while they do not depose that they saw Joshua Whitfield dead, still they prove that it was common report that he had died and had been buried, and that his wife went over to the place at which he had died and got the few belongings which he left. Apparently it was contended by appellee that the marriage between Garrett and appellant was void by reason of Joshua Whitfield, the former husband, being alive at that time. On this record the rule is laid down in *Beardsley v. A. & V. R. R. Co.*, 79 Miss. (1902) 417, is directly operative, wherein it was declared.

“A marriage duly proved will be presumed valid, although a former wife or the man may be still living and there be no evidence of a divorce from her, the burden of proof to show the negative fact that there was no divorce being on the party who denies the validity of the second marriage.”

The authorities are reviewed at length and we especially direct attention to the authorities therein collated. Also, we submit, that *Hull v. Rawles*, 27 Miss. (1855) 471, is directly in point.

“On the part of the administrator, it was proved that James C. Rawles was living in the year 1844, in Chickasaw county, with a woman whom he treated as his wife and that the parties were recognized as husband and wife in the community.

“Another witness proved that he heard Rawles say, after his marriage with petitioner, and in her presence, that his first wife was then living in the state of Georgia. This was, in substance, all the evidence introduced on the trial in the court below.

“Aside from the statement of Rawles, there is nothing in the testimony which raises a suspicion against the validity of the marriage. The fact that the deceased was living in 1844 with a woman believed to be his wife, is no evidence that she was living on the 6th of December, 1848. The marriage having been solemnized according to the forms of law, every presumption must be indulged in favor of its validity. The statement of Rawles, while it could have been used as evidence against him in a proceeding in which he was directly interested, or could be affected, cannot be used to the prejudice of the petitioner. By consummating the marriage, he admitted that he could then legally enter into the alliance. The statement may have been true, that the first wife was then living; and still it would not necessarily follow that she was in a legal sense his wife, as the parties may have been legally divorced.” See, also, *Spears v. Burton*, 31 Miss. (1858) 555.

“6. The marriage of the plaintiff’s mother with his father, A. P. Burton, although it may have been within five years after the departure of her former husband, Bayard, is to be held valid by the jury, unless the proof satisfies them that Bayard was alive at the time of the marriage of A. P. Burton with the plaintiff’s mother; the presumption of law as to the continuance of the life of Bayard after his departure, will not be sufficient to establish the fact that Bayard was alive at the time of the marriage of A. P. Burton with plaintiff’s mother.

“We consider these instructions as stating the correct rule upon the subject. It is true that the presumption of law is, that Bayard was alive until the lapse of five years after his departure had given rise to the presumption of law that the marriage of the plaintiff’s father and mother was valid, it having been solemnized in due form of law. It was valid, unless the former husband was living at that time. But unless he was shown to be then living, the presumption must be indulged that he was dead; because, otherwise, the second marriage would be held criminal by reason of a presumption which would be to establish a crime upon a bare presumption. *Rex v. Gloucestershire*, 2 Barn. & Ald. 386. Moreover, the probabilities greatly strengthen the legal presumption of Bayard’s death at the time, and show its justice under the circumstances of this case, as he has never been heard of since his departure. It would therefore be unjust and unreasonable to give force to the presumption that he was living at the time of the second marriage, when subsequent facts tend strongly to show that the presumption of his death, upon which the parties acted, was true in point of fact.”

In *Wilkie v. Collins*, 48 Miss. (1873), 511: “The controversy originated about this administration in 1871, eleven years after Mrs. Roberts supposed that her husband had died, and about nine years after she had married Wilkie, the intestate; and yet in this long interval nobody has ever heard of him alive.”

These cases, we submit, demonstrate the validity of the marriage between Garrett and his wife. The burden of proof to show that Joshua Whitfield was alive at the date of the marriage of Samuel Garrett and Kate Whitfield was upon appellee, and that burden has not been met. The marriage has been shown beyond a peradventure of a doubt, and the sole contention that can be made is that as appellant had had a former husband that he was alive at the date of her marriage. The law does not allow any such presumption, and in fact every presumption is indulged in favor of the validity of the marriage, and as it appears by the record of the county to have been valid and so treated by all parties, and the alleged dead husband not having been heard from since 1879 either by his wife or by his own children, it is not a violent presumption to indulge that Joshua Whitfield died in the poorhouse at the time mentioned.

John N. Bush and McLaurin, Armstead & Brien, for appellee.

The note of evidence made by the chancellor shows that the deposition of Kate Taylor was introduced. Certainly that means the complete disposition or otherwise the chancellor would have made mention of it or would have excluded it. Under these circumstances, and in consideration of the presumption that follows as to the correctness of the judgment of the court below, we do not see how this court can undertake to say that it was not shown on the trial below that Kate Taylor's first husband Joshua Whitfield, was not living at the time of her marriage or pretended marriage to Samuel Garrett; and if this was shown to be true, which must have been presumed from the condition of the record, there was no other conclusion that the court below could reach except to deny the grounds of relief as prayed for in the bill of complaint. Under these circumstances, and until the record is complete, we consider it absolutely unnec-

essary and useless to be drawn into a discussion of the facts in this case or a discussion of the law and the pleadings.

Argued orally by *Gardner W. Green*, for appellant.

WHITFIELD, C.

We cannot concur in the view of the learned chancellor of the court below, whose view must have rested upon the idea that the evidence was not sufficient to establish the marriage. We think the evidence clearly shows a marriage.

PER CURIAM.—The above opinion is adopted as the opinion of the court, and, for the reasons therein indicated, the decree is reversed, and the cause remanded.

Reversed and remanded.

MRS. ELIZABETH BALDRIDGE v. J. R. STRIBLING ET AL.

[57 South. 658.]

1. ACTIONS AGAINST ESTATES. *Witnesses. Competency. Best evidence. Foundation. Secondary evidence. Hearsay. Declarations. Against interest. Gifts. Undue influence. Validity. Code 1906, Sec. 1917.*

In a controversy between the heirs of a decedent over personal property claimed to have been given one of them by decedent before his death, the testimony of the donee of the gift is not admissible to establish his claim to the property, since Code 1906, Sec. 1917, provides that no person shall testify as a witness to establish his own claim or defense against the estate of a deceased person, which originated during his lifetime.

2. EVIDENCE. *Best evidence. Secondary evidence. Laying foundation.*

Even against the estate of a decedent a party in interest asserting a claim or defense may testify that she received a letter for

the purpose of laying the foundation for the introduction of the letter.

3. SAME.

A copy of a letter cannot be introduced in evidence where there is no evidence accounting for the absence of the original—nothing to show that it was lost or destroyed.

4. EVIDENCE. *Declarations of deceased persons. Against interest. Hearsay.*

Declarations whether verbal or written made by a deceased person as to facts presumably within his knowledge, if relevant to the matter of inquiry, are admissible in evidence as between third parties.

First. When it appears that the declarant is dead.

Second. That the declaration was against his pecuniary interest.

Third. That it was a fact in relation to a matter of which he was personally cognizant.

Fourth. That the declarant had no possible motive to falsify the fact declared.

5. GIFTS. *Undue influence. Burden of proof.*

The burden of proof is upon one seeking to invalidate a gift of money *inter vivos* to show that the gift was induced by undue influence and mere suspicion, however strong, is insufficient upon which to set aside the transaction.

APPEAL from the chancery court of Lowndes county.

HON. J. F. MCCOOL, Chancellor.

Suit by Elizabeth Baldridge against S. R. Stribling and wife. From a decree for defendants, complainant appeals.

Mrs. Baldridge filed a bill in the chancery court against S. R. Stribling and wife for an accounting. The bill alleged that one P. Cates, father of complainant and of Mrs. Stribling, died, leaving certain property which by will he had devised equally to his two daughters, Mrs. Baldridge and Mrs. Stribling; that for some time prior to his death he had lived with Mrs. Stribling, and that she and her husband had taken possession of his property, which consisted of money, and had unduly influenced the decedent to part with same; and that they

had converted it to their own use, etc. Defendants filed separate answers, denying that they had possession of any of decedent's property, admitting that he had lived with defendants for some time before his death, and averring the fact to be that some time prior to his death he had drawn all of his money from the bank, and had given three thousand, six hundred dollars to his daughter, Mrs. Stribling, upon condition she would take care of him the balance of his life, and give him what spending money he needed, and pay doctor's bills, funeral expenses, etc.

On the trial, Mrs. Stribling and her husband testified to these facts, and their testimony is substantiated by their son and son-in-law, Gryder, and by the cashier and teller of the bank, who testified that decedent came in person to the bank and withdrew his money, and that the following day Mr. Stribling deposited three thousand, six hundred dollars to his wife's credit. The bank books substantiated this testimony. Mrs. Stribling testified that her father, in his old age (being nearly ninety years old), was very feeble and spent most of his time alternately between his two daughters; that a few years before his death Mrs. Baldridge had moved to Florence, Ala., to live with her married daughter, Mrs. Price; that when their father left Florence, and came to the home of the Striblings at Columbus to spend a while with them, Mrs. Stribling received a letter from Dr. Price, the son-in-law of Mrs. Baldridge, with whom she had been living, stating that they could not board the old man any longer as their house was crowded and they needed the spare room for other purposes. Mrs. Stribling testifies that after her father had stayed with her for awhile he broached the subject of returning to Florence to spend a while with Mrs. Baldridge, and it was then that she informed him of the contents of Dr. Price's letter, and that he seemed very much distressed, and stated that he was sorry he had divided all his property among his

children (as he had done some years before), and that he had made a will leaving the balance equally to Mrs. Baldrige and Mrs. Stribling, but that, as the will never had been filed, he would now give Mrs. Stribling the balance of the money he had on hand, on condition she would take care of him for his remaining years, which she agreed to do.

Depositions were taken, and a motion was made by complainant to suppress the depositions of Mrs. Stribling as to the gift made to her by her father a short while before his death, because it was an effort to assert a claim against the estate of a deceased person, and to suppress that part of her testimony relative to the contents of the letter which she had received from Dr. Price, as the original letter was the best evidence. The court overruled the motion, and entered a decree for the defendants, and complainant appeals.

W. J. Lamb; for appellant.

The principal question presented for the court's attention in this case is the motion to suppress testimony. We contend that the testimony is not competent and that the motion of the appellant to suppress the testimony should have been sustained.

This is a controversy which arose between two sisters, daughters of Pleasant Cates, about the estate of their father, none of the other heirs of Mr. Cates claiming any interest whatever in this estate.

Mr. Cates departed this life in December, 1906, testate. His will was duly recorded in the chancery clerk's office of Lowndes county, Mississippi, where he resided and was living at the time of his death. In this will he left all of his property of which he died seized and possessed to his two daughters, the appellant, Mrs. Elizabeth Baldrige, and one of the appellees, Mrs. Mary Jane Stribling. Mrs. Stribling denies that Mr. Cates, her father, left any estate whatever. However, she admits

in her testimony and in her answer that the deceased, Pleasant Cates, did have some money, to-wit: the sum of three thousand, six hundred dollars which Mrs. Stribling contends the deceased gave her in February, 1906. After the will was probated, Mrs. Baldridge called on Mrs. Stribling and demanded of her that she surrender one half of this sum and any other sum that she had, or that Pleasant Cates had, at the time of his death, which Mrs. Stribling refused to do, claiming that all of his property was hers, made to her as a gift in February, 1906.

The principal testimony in this record to sustain that contention is the testimony of Mrs. Stribling, and the contention that this property was a gift to Mrs. Stribling must virtually stand or fall on her own testimony.

This question has been settled repeatedly by the courts in favor of the appellant's contention, to-wit, that Mrs. Mary Jane Stribling was not a competent witness to testify in her own behalf in this case.

In the case of *Cockrell et al. v. Mitchell*, the court said: "The objection to the competency of the appellee as a witness should have been sustained. The purport of his testimony was to show that his father had given him the mule in controversy, and, the father being now dead, the appellee is disqualified to testify as a witness as to any transaction had with him. The case is within the principles of many adjudications of this court. It is entirely covered by *Jackson v. Smith*, 68 Miss. 53, 8 South. 258. Judgment reversed." *Cockrell v. Mitchell*, 15 South. 41, and a more recent decision in this point is the case of *Burnett v. Smith*, 93 Miss. 566.

If the motion of the appellant is sustained, as we contend it should be, then the relief should have been granted to the appellant in this case, for there is nothing here on which Mrs. Stribling can base her contention that this money was a gift to her from her father.

Now, Mrs. Stribling contends that her father gave her this money in February, while the conversation about

which Mr. Cates testifies took place the following June; and R. C. Cates has no interest in this lawsuit and is not claiming any of the estate of Pleasant Cates.

If the motion to suppress the incompetent and irrelevant testimony in this case is sustained, it leaves the appellee without anything whatever on which to stand to sustain their contention. We respectfully submit to the court that this motion ought to be sustained and that the appellant is entitled to an accounting against the appellee for the money belonging to this estate and ought to have her one-half interest in her father's estate.

E. T. Sykes, for appellees.

Campbell, J., delivering the opinion of the court in *Jacks v. Bridwell*, 51 Miss. 881, says: "The term 'estate of a deceased person' is used, in its broad and popular sense, to signify all property of every kind which one leaves at his death. Therefore, any 'right' asserted against real or personal property left by the deceased person, as accrued to the party by virtue of a dealing between him and such person, since deceased renders the person asserting it incompetent as a witness to maintain in his own behalf such asserted right."

It follows that as shown by the testimony of Mrs. Stribling and that of her husband supported, yea confirmed, by the testimony of W. P. Stribling and W. C. Gryder, the deceased, P. Cates, having disposed of all his property in his lifetime and therefore left no estate in possession at his death, Mrs. Stribling was a competent witness, and could legally testify as to the gift of the money to her by deceased in his lifetime and which gift *inter vivos* of all his property removed it from the operation of any prior will of the decedent. Such gift operated as an ademption of the property and a total revocation of the will which Mrs. Baldrige is seeking to establish. 30 Am. and Eng. Ency. of Law (2 Ed.), 652 (5).

Again if the interest claimed by a witness is shown to have been transferred and delivered (as here the possession of, and title to, the money was delivered by the decedent in life to Mrs. Stribling as an absolute gift) before the death of the decedent, the donee thereof is not disqualified by the statute to testify as a witness to establish his or her claim thereto. *Snell v. Fewell*, 64 Miss. 655.

In the above case, Cooper, C. J., speaking for the court says: "But it must appear either that the witness is interested in the subject-matter or that he was so interested at the time of the death of the decedent. If on the fact developed in the trial it should appear that the interest claimed to have been transferred before the death of the decedent had in fact been transferred after the death, the testimony should be excluded; but where, by the testimony of such witness or otherwise, it was shown that the transfer was made before the death, the witness is competent." Citing 1 Greenleaf on Evidence, 422, 424.

I trust I will not be considered presumptuous in stating that the cases cited by counsel for appellant in support of his contention do not in any wise conflict with, or weaken the test enunciated in the foregoing cited cases as to the competency of witnesses under Sec. 1917, Code of Miss. Whilst it is conceded that his cited authorities announce the general rule of evidence in this state, yet, on inspection they will be found not to apply to, or to control cases where the facts are, as in the instant case, to wit, where there is no property or estate of the decedent at the time of his death.

To differentiate the cases one has only to look to the facts involved. To illustrate: The court, in *Cockrell v. Mitchell*, 15 South. 41, merely reaffirmed the holding of the court in *Jackson v. Smith*, 68 Miss. 53, and which it cites. Now turning to the facts in the last-mentioned case we find them wholly different from those above cited by me as authority.

In the cases cited and relied on by appellant, there was an estate left by the deceased; because, as held in *Jackson v. Smith, supra*, "the mule" in controversy, "was part of the estate of Rogers," the decedent "who had died in possession of it." Hence, Smith the appellee, who claimed the mule under a trust deed, was held to be disqualified to prove his claim and right to the mule as against the estate of Rogers.

In the case of *Jackson v. Smith, supra*, Judge Campbell cites *Love v. Stone*, 56 Miss. 449, wherein it was held that "The test of competency in this class of cases (involving the construction of Sec. 1917, Code 1906) is whether the estate of the deceased person is the subject-matter of the litigation in which the party is offered as a witness."

In *Walker v. Marseilles*, 70 Miss. 283, it is held that, in an action to recover personal property, it is error to exclude testimony for plaintiff that the person, since deceased, under whom defendant claims title, had stated, before defendant's claim arose, that the property was not his. "And so, I contend, it would be error to exclude testimony in this case showing that P. Cates, months before his death and continuously to the date of his death, stated and reiterated the statement to the said witnesses, that the money, to wit, three thousand, six hundred and eight dollars and thirty-five cents delivered by him to his daughter, Mrs. Stribling, on February 18, 1906, was not his, but that it was the money of his said daughter. Could a gift be more absolute and pronounced?"

It will thus be appreciated at a glance that there is no similarity in the facts of the instant case, and those of *Jackson v. Smith, supra*, cited and affirmed in *Cockrell v. Mitchell, supra*. In *Jackson v. Smith*, the decedent was in the possession of the property, "a mule" at the time of his death, and therefore the court held his grantee to be an incompetent witness. And thus by fair

implication, the court would have held otherwise had the mule been in possession of claimant at the time of decedent's death.

But, even should the court (which I cannot think it will) holds Mrs. Stribling to be incompetent to testify fully, yet it should hold her competent to lay the foundation for evidence *aliunde*, to-wit: the testimony of S. R. and W. P. Stribling, and that of W. C. Gryder, confirmatory of her testimony of the gift to her in the lifetime of, and by, the said P. Cates. *Cole v. Gardner*, 67 Miss. 670, citing *Harper v. Lacy*, 62 Miss. 5.

In the first-named case, the court held copying the first paragraph of the syllabi, "even as against the estate of a decedent, a party in interest asserting a claim or defense may testify to the loss of a right in laying the foundation for the introduction of secondary evidence to prove its contents." And in the same case, the cases of *Love v. Stone*, 56 Miss. 449 and *Combs v. Black*, 62 Miss. 831, are cited, which hold that a party interested is competent to lay the foundation for secondary evidence.

Commenting as to the objection that Mrs. Stribling and the depositions, of those of her witnesses excepted to, "attempt to prove declarations of the decedent which were not against the interest of decedent, and therefore, hearsay." I merely reply that no declaration could be more in derogation of the interest of declarant than were those of decedent, P. Cates, emphatically stating to Mrs. Stribling and to her husband, also to W. P. Stribling and W. C. Gryder, that he, the decedent, for reasons expressed and superinduced by the effect upon him of the Doctor Price letter (embodied in the record), would administer his estate during life, and therefore would, and did give his land and only promissory note to Mrs. Baldridge, and all his money to Mrs. Stribling; that immediately thereafter he proceeded to and did make a deed conveying the land, and delivered possession to

Mrs. Balridge, and also delivered to her his only chose in action; and withdrawing his money (all that he owned) from the bank where deposited, and giving and delivering possession of it to Mrs. Stribling with whom he proposed, and it was understood, that he would live and be cared for during the remainder of his days on earth, and who would execute his wishes as to burial; surely Mrs. Stribling was competent to testify to such a declaration of fact, in disparagement of declarant's interest or title. For the universal rule of evidence is, that declarations of a deceased owner of property in disparagement of his title, to whomsoever made, are competent against his personal representative and next of kin, or legatees. 16 Cyc. 996 (iv); *Walker v. Marseilles*, 70 Miss. 283, citing *Brown v. McGraw*, 12 S. & M. 267; *Graham v. Busby*, 34 Miss. 276.

Again, that S. R. Stribling is a competent witness for his wife, see *Safford v. Herne*, 72 Miss. 470, citing *Ellis v. Alford*, 64 Miss. 8.

It is there held that, "A husband or wife may testify for each other against the estate of a decedent.

McLEAN, J., delivered the opinion of the court.

One of the defendants in the court below, Mrs. Jane Stribling, testified that, a short time before her father's death, he came to her with a roll of money in his hand and said that that was all the money he had left; that he wanted to give it to her, with the understanding that she was to take care of him during his life, and after his death to give him a decent burial; that he actually delivered to her the money, three thousand, six hundred dollars. The appellant, complainant in the court below, objected to this evidence on the ground that the witness was establishing her own claim against the estate of a deceased person. The chancellor overruled the objection. The appellee contends that this witness was not testifying to establish her own claim against the estate

of a deceased person, as the deceased had no estate of any kind at the time of his death in this money, and hence that Sec. 1917 of the Code of 1906 does not apply to the testimony of this witness, and in support of the contention relies upon *Snell v. Fewell*, 64 Miss. 655, 1 South. 908. The counsel misconceives the opinion of the court in this case. The witnesses in that case were held competent, for the reason that neither of them was seeking to assert any claim or interest in the property. To say, as appellee contends, that the deceased, the father of Mrs. Mary Stribling, had no estate or interest in the property in controversy, is to assume as true the very point in question. The testimony of this witness was in the teeth of the statute, which declares that "no person shall testify as a witness to establish his own claim or defense against the estate of a deceased person which originated during the lifetime of such deceased person, or any claim he has transferred since the death of such decedent." The claim of Mrs. Stribling to this money arose during the lifetime of the deceased, and the object and purpose of the legislature in enacting this statute was to prohibit this testimony. The following authorities are squarely on the proposition: *Burnett v. Smith*, 93 Miss. 566, 47 South. 117; *Cockrell v. Mitchell*, 15 South. 41; *Jackson v. Smith*, 68 Miss. 53, 8 South. 258.

Mrs. Stribling was a competent witness to prove that she received the letter written by Dr. Price, for the purpose of laying the foundation for the introduction of the letter. *Cole v. Gardner*, 67 Miss. 670, 7 South. 500; *Harper v. Lacy*, 62 Miss. 5. What purports to be a copy of the letter is attached, as an exhibit, to the defendant's answer; but the letter itself was not introduced, nor was there any evidence accounting for the absence of the original—nothing to show that it was lost or destroyed—and consequently no foundation was laid for the introduction of its contents, and hence all the evidence relating to the contents of this letter was clearly inadmissible.

The defendants also objected to the testimony of Wm. P. Stribling, S. R. Stribling, and W. C. Gryder, on the ground, chiefly, that their testimony is hearsay. All of the witnesses testified that the deceased, P. Cates, stated to them at different times that he had given his money to Mrs. Mary Jane Stribling, and that she was to take care of him. While these statements of the deceased may be regarded as hearsay; yet they are declarations against interest, and accordingly are admissible; the rule being that declarations, whether verbal or written, made by a deceased person as to facts presumably within his knowledge, if relevant to the matter of inquiry, are admissible in evidence as between third parties (1) when it appears that the declarant is dead; (2) that the declaration was against his pecuniary interest; (3) that it was of a fact in relation to a matter of which he was personally cognizant; and (4) that the declarant had no possible motive to falsify the fact declared. Notes to 94 Am. St. Rep. 673; Am. & Eng. Ency. of Law, vol. 9, p. 8.

The gift or transfer of this money was assailed upon the ground of undue influence; but the complainant failed to meet the burden imposed upon her, and mere suspicion, however strong, is insufficient upon which to set aside the transaction. *Powell v. Plant*, 23 South. 402.

Objections were made to other portions of the evidence; but, as no harm could possibly be done to either party, either by the admission or rejection of this evidence, we do not consider it necessary to refer to it.

Disregarding entirely the incompetent testimony, there is ample evidence to support the decree, and the same is affirmed.

Affirmed.

JAKE RICHARDS v. CITY LUMBER Co.

[57 South. 977.]

1. MASTER AND SERVANT. *Actions. Proof. Variance. Statutes. Retroactive operation. Constitutional law. Vested rights. Laws 1910, Ch. 135.*

A plaintiff cannot predicate his recovery on grounds not alleged in his declaration and it is not error for the court to refuse an instruction which does this.

2. LAWS 1910, CH. 135. *Retroactive operation.*

Chapter 135, Laws 1910, providing that "in all actions hereafter brought" for personal injuries, contributory negligence shall not bar a recovery, is not retroactive.

3. SAME.

The rule is fundamental, in the construction of statutes, that they will be construed to have a prospective operation, unless the contrary intention is manifested by the clearest and most positive expression; such a construction should be placed upon a statute in order to preserve, if possible, its constitutionality.

4. CONSTITUTIONAL LAW. *Vested rights.*

The legislature has no power to take away vested rights in order to create a cause of action out of an existing transaction for which there was at the time of its occurrence no remedy; nor can it destroy a valid defense to an action existing before the enactment of the statute.

APPEAL from the circuit court of Pike county.

HON. D. M. MILLER, Judge.

Suit by Jake Richards against the City Lumber Company. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Brady & Dean, for appellant.

We desire to call the attention of the court especially to what we believe to be serious errors committed by the trial judge, as follows:

First, in refusing to grant to plaintiff below the instruction asked by him, and refused, numbered "4."

Second, in granting to defendant below the instructions asked by it, and given, numbered "6" and "11."

With regard to the first point noted, we beg to quote again the instruction refused:

"The court instructs the jury for the plaintiff that if they believe from the evidence in the case that Lucius Magee, in the absence of Skean, was by the defendant authorized to perform the duties of the superintendent, and that at the time the plaintiff was injured he was in charge of the planing machines performing the duties of the superintendent, and saw the machine choke, or, by the exercise of reasonable care could have seen it, then it was his duty, as superintendent in charge, to direct the manner of handling the machine; and if they believe from the evidence, that with knowledge of the trouble he neglected and failed to direct the handling of the machine after it choked, and he left plaintiff to his own resources, and that the plaintiff, while exercising reasonable care and caution, was injured by the breaking of a belt which was defective, or defectively laced, then they will find a verdict for plaintiff, even though they may believe the lumber being passed through the machine was too large and choked the machine."

Appellant contends that this instruction correctly stated the law and there was no good reason for not granting it. It is not an instruction on the weight of evidence, for it does not say that Lucius Magee was acting superintendent in the absence of Skean, but leaves that to the determination of the jury; it further leaves to be determined by the jury the question of whether or not he neglected and failed to direct the handling of the machine, with knowledge of the trouble; and states finally that "if they believe from the evidence that the plaintiff, while exercising reasonable care and caution, was injured by the breaking of a belt which was defect-

ive, then, . . . etc.” The saving expression, “if they believe,” applies to every question stated in the instruction, to the condition of the belt as well as the status of Lucius Magee. The jury are not precluded by it from finding that the belt was defective, but are instructed that if they believe that plaintiff was injured by the breaking of a belt which was defective, and the other facts theretofore stated are found to exist by them, then they will find for plaintiff.

There was testimony offered upon every point mentioned in the instruction. There was testimony that Lucius Magee was in charge of the mill and machinery in the absence of superintendent Skean, and this testimony came from defendant’s witnesses as well as plaintiff’s. It was “up to the jury” to decide whether or not by authority or custom he stood in the place of the superintendent, in his absence, and was vested with the same powers; there was testimony from which the jury could say that at the time of this accident Lucius Magee, the acting superintendent, saw the machine choke, or could and should have seen it choke; there was testimony from which they could say that he failed and neglected to perform the duties of acting superintendent and left plaintiff to his own unaided resources; there was testimony that the belt was not in a good condition, but was defective and worn; there was abundance of testimony that the belt was defectively laced, witness Morris’ testimony on this point being different from what it is stated by appellee to have been, as he stated that he never used wire lacing, used lace leather, laced his belts double, which was more substantial than the single lace, which was a cheap and easy way only. There was also testimony that plaintiff was exercising a proper degree of care and caution. This being true, how can it be denied, as a matter of law, that if Magee, in the absence of the superintendent, became superintendent in charge of the machine, and if he saw the machine choke, and if

he failed to exercise his duties, and if the belt was defective or defectively laced, and if plaintiff exercised reasonable care and caution and was injured by the breaking of the belt, then he should recover damages from defendant? Yet that is what the instruction did set forth—and the lower court refused.

This is a true statement of the law, even though appellee should go so far as to claim that Magee did not possess the dignity of a vice principal. See *Bradford v. Taylor*, 85 Miss. 409.

The proof did not show that Skean was within fifteen or thirty feet at the time of the accident, or when the machine choked, but his own testimony shows that he was outside of the mill, and out of sight of Richards, while Magee was right on the scene. Further, the instruction was not calculated to relieve Richards of the effect of his own negligence, if he was guilty of such. It was and is a good instruction.

With regard to the error committed by the trial judge in giving to defendant the instructions numbered "6" and "11," which read as follows:

"6. The court instructs the jury for the defendant that if you believe from the evidence that the plaintiff was injured by reason of his own negligence, or that his own negligence contributed proximately to his injury, then you must find for the defendant."

"11. The court instructs the jury for the defendant that even though you may believe from the evidence that the belt was in a defective condition, yet if you believe plaintiff knew it, or could have known it by the exercise of reasonable care, and that he voluntarily used it in that condition, and was thereby injured, then he cannot recover in that case, and you should find for the defendant."

These are in direct violation of the law as laid down in chapter 135, Laws of Mississippi of 1910, which it is needless to quote here, except its opening phrase, namely,

“In all actions hereafter brought. . . .” This act was approved April 16, 1910, while the suit in question was not filed until January 12, 1911. The objections urged to this act so far as its “retroactive” feature is concerned, while naturally to be expected from appellee, are yet without merit. Only two of the authorities cited by appellee are in point, namely *Reed & Co. v. Beall*, 42 Miss. 472, and *Powers v. Wright Bros.*, 62 Miss. 35, which bear out the rule laid down in 8 Cyc. 1017 (X. A. 2) and 1019 (X. A. 3), (b, c); also 36 Cyc. 1213, paragraph 2.

No vested rights are disturbed by the retrospective action of this law, no obligation of any contract impaired, no change made except that by this statute the common law is more clearly enunciated, and it is the duty of the trial judge to charge the juries accordingly. This was not done in this case, and there is no escape from the consequence of this failure on his part. The act is constitutional. See *Natchez & Southern Railroad Co. v. Crawford*, 55 South. 596.

Price & Price, for appellee.

On the 16th day of April, 1910, long after the appellant had been injured, and the rights and liabilities of the parties fixed by existing laws, the legislature of Mississippi passed the following act:

“In all actions hereafter brought for personal injuries or where such injuries have resulted in death, the fact that the person injured may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured.

“Sec. 2. All questions of negligence and contributory negligence shall be for the jury to determine.

“Sec. 3. That this act shall take effect and be in force from and after its passage.

“Approved April 16, 1910.”

There was no effort on the part of able counsel for the appellant in the trial of this cause in the circuit court to make Ch. 135 of the Laws of 1910 applicable to this case, but, in reading their brief we find it is sought here to make that statute apply, whereas the injuries were received, and the rights of the parties fixed, under the law existing at the time, long before the passage of the act above quoted.

Appellant claims that this statute is retrospective, and the rights of the parties must be determined by it and not by law in force at the time of the accident.

The mere fact that this act was not in existence at the date of the injury complained of, but was enacted by the legislature long thereafter, in our judgment is an all sufficient answer, and should put at rest that question.

It is not our contention that no retrospective law can be passed in Mississippi; but if such a statute is passed and is not by its terms wholly retrospective, then it will not be declared by the court retrospective. It must expressly, positively and certainly be so declared in the face of the statute. Such a statute is so closely akin to an *ex post facto* law, and carries with it so much of its mischief, that it could not be construed by the court as retrospective. To so construe it would be to impair vested rights.

In *Carson v. Carson*, 40 Miss. 349, this court said: “Courts of justice always express the strongest disapprobation of such legislation and will never be persuaded that the legislature intends to give a retrospective effect to its enactment without the clearest and most positive expression of such a purpose.”

In the case cited, the act of February 6, 1860, was under consideration, and it provided “that in all cases where parties have, prior to the passage of this act, lived separate and apart for the period of four years within this state, and either of them may desire to be divorced

from the bonds of matrimony, and have not lived separate and apart by collusion, and with the intent of procuring a divorce, it shall be lawful for them, or either of them, to file a bill setting forth such desire; and upon due proof of such living separate and apart, it shall be competent for the court to decree a divorce from the bonds of matrimony.”

The court will observe that this statute had no prospective operation at all, but was wholly retrospective.

“But where an act is, like the present, retrospective only, and purposes to operate alone upon acts that have already passed, and has no prospective operation whatever, there is no room left for construction, and courts are obliged, however, reluctant, to give effect to the intention of the framers.”

That act impaired no contract, and divested no vested rights, as the one here under consideration. That act was wholly retrospective; the one here is wholly prospective.

The same case holds—“that such legislation cannot be too strongly condemned as unwise, impolitic and unjust.”

In 8 Cyc., at page 1022, it is said, that “Statutes not expressly made retrospective in terms, are otherwise construed, if possible, citing 4 Cal. 127; 28 Ga. 597; 7 Wend. (N. Y.) 661; 5 Am. Dec. 291; 28 L. R. A. 796; 11 Lea, Tenn. 127; 10 Cen. Dig., Const. Law, 535.

In 36 Cyc. page 1210, the doctrine is announced: “The rule that statutes are not to be construed retrospectively, unless such construction was plainly intended by the legislature, applies with peculiar force to those statutes the retrospective operation of which would impair or destroy vested rights.”

“And where a right of action for damages has accrued before the passage of the act, such rights will not be impaired or affected by the new act.” Citing 186 N. Y. 66; 141 N. Y. 158; 29 Pa. St. 22; Same vol., Cyc., page 1212, we quote:

“A statute will not be given a retroactive construction by which it will impose liabilities not existing at the time of the passage,” and included in this are liabilities imposed upon common carriers.” 70 Miss. 701; 10 S. & M. 599; 56 Miss. 173; 62 Miss. 35; 12 S. & M. 304; 82 Miss. 135. See Hutchinson’s Code, 728, for statute construed by the court. 65 W. Va. 456; 23 Ky. 1546; 43 N. Y. 400; 103 Va. 250, 48 S. E. 889; 42 Am. Dec. —; Dec. Ed. Const., Sec. 23, 42 L. R. A. 783.

Same Cyc., at page 1215, we quote: “Such a statute will not be applied by the courts to actions or proceedings pending at the time of its passage whenever such application would work injustice, as by cutting off rights to which parties were entitled under the prior law, or subjected a party to new liabilities.” Citing 58 Me. 395, 93 N. W. 144; 200 Mo. 718.

In the *Carson case*, *supra*, the court held “that marriage was not a civil contract, could not be dissolved by mutual consent, but was ‘public juris,’ subject to the public will, establishing fundamental relations, and no vested rights are violated.”

The case of *Reid & Co. v. Beall*, 42 Miss., cited by counsel, has no peculiar application to the case at bar. It holds: “That because the town of Corinth had taxed Reid & Company, was no reason why the state should not also tax the same concern. That the fact was a revenue measure involving the state’s sovereignty, and the license to sell liquor was in no way a contract, and such rule would be to create a contract where none existed, and one without mutuality.”

“That the license was merely a franchise, and a franchise being a creature of the law and peculiarly the object of the taxing power is not exempt from taxation, unless it is specially provided against by the act creating the franchise.”

There being no statute in this state changing the common law that applied to this case, the defendant was entitled to an instruction on contributory negligence.

The instruction complained of by appellant is as follows:

“The court instructs the jury for the defendant, that if you believe from the evidence that the plaintiff was injured by reason of his own negligence, or that his own negligence contributed approximately to his injury, then you must find for the defendant.”

The general rule is, that no statute is to have a retrospect beyond the time of its commencement. Blackstone treated it as a first principle, that all laws are to commence in the future and operate prospectively, 1 Comm. 44.

Lord Coke lays down the rule to be: “That an act is to be so construed, so that no man who is free from injury or wrong shall by a literal interpretation be endamaged or punished.”

If contributory negligence was a defense before the act was passed, then to declare the act applicable to this case, vested rights are disturbed and the defendant damaged.

If chapter 135 of the Laws of 1910 applies to this case, then we possessed rights before the statute was enacted, which we do not now possess. We had defenses then that we have not now, and these defenses went to the entire cause of action. To make such an “unwise, impolitic, and unjust” statute applicable, takes our money and delivers it to the plaintiff, makes us liable for heavy damages where we were not liable for any damages under the law when the injury was sustained. In the one case the plaintiff had to be free from negligence; in the other the defendant must be free from negligence. In the one case, if defendant was negligent, the plaintiff must be free from negligence. We quote extracts below from the opinion in *Dash v. Kleeck*, 5 Am. Dec., 306, decided by O. J. Kent:

“A statute is never to be construed against the plain and obvious dictates of reason.” “Courts are bound

to give such construction to statutes as is consistent with justice, though contrary to the letter of the statute."

"Any other construction, and we are punishing an innocent party, as well as divesting him of a right previously acquired under the existing law." "We are to presume, out of respect to the lawgiver, that the statute was not meant to operate retrospectively, and if we call to our attention the general sense of mankind on the subject of retrospective laws it will afford us the best reason to conclude that the legislature did not intend to set so pernicious a precedent." "How can we possibly suppose that in so unimportant a case, when there was no strong passion to agitate and no great interest to impel, that the legislature coolly meant the prostitution of a principle which has been venerable for the antiquity and universality of its sanction, and nothing short of the most direct and unequivocal expression should justify such a conclusion."

Quoting from Judge Thompson, in the same case, page 303: "the best settled rule of construction given by the English courts to the Statute of Frauds, 29 Car. ii, Ch. 3, goes strongly in corroboration of the interpretation I have given to the act before us."

The language in that statute is "that from and after the 24th of June, 1677, no action shall be brought whereby to charge any person upon an agreement in consideration of marriage, etc." "Yet it has been uniformly held, that it would not retrospect, so as to take away a right of action to which a party was before that time entitled, but applied only to promises made after the 24th of June, 1677."

If it could take away no right of action from the plaintiff, then it could take away no right of defense existing to the defendant.

"It is not pretended that we have any express constitutional provision on the subject; nor have we on

numerous other rights, dear alike to freedom and justice.”

“An *ex post facto* law in the technical sense of the term is usually understood to apply in criminal cases, and this is its meaning when used in the Constitution of the United States. Yet laws impairing previously acquired civil rights are equally within the reason of that prohibition and equally to be condemned.”

“We have seen that the cases in the English and civil laws apply to such rights, and we shall find upon further examination that there is no distinction in principle, nor recognized in practice, between a law punishing him civilly by divesting him of a lawfully acquired right.” “The distinction consists only in the degree of the oppression, and history teaches us that the government which can deliberately violate the one right, soon ceases to regard the other.” A law may be repealed by the legislature, but the rights of citizens existing under such a law cannot cease.” “It would be an act of absolute injustice to abolish with a law all the effects which it had produced.” “Even French despotism, as atrocious as it is in practice, yields, in its law to the authority of such a principle.” “And as often as the question has been brought before the courts of justice in this country, they have uniformly said that the objection to retrospective laws applies as well to those which affect civil rights as to those which relate to crimes.”

We are not to be understood as contending that all retrospective laws are *ex post facto*, yet we know that all *ex post facto* laws are retrospective.

Argued orally by *G. Q. Whitfield* and *T. Brady*, for appellant.

McLEAN, J., delivered the opinion of the court.

Appellant was in the employ of the appellee in appellee's saw and planing mill, and while so employed was

injured, and this suit is brought to recover for the injuries sustained. The count in the declaration is that it was the duty of the master to provide the plaintiff with a reasonably safe place in which to do the work assigned him, and to furnish the plaintiff with suitable, safe, and sufficient machinery and appliances with which to do the work, but that the defendant did not perform its duty in this respect; and the declaration further alleges that the work enjoined upon plaintiff became, without the knowledge of plaintiff, perilous, dangerous, and hazardous, by reason of the fact that the plaintiff was put to work in the planing mill, which was worn, old, and so defective that, when a heavy piece of lumber was put in it to be planed, it put so much and unusual force upon the belting as made the belt to break, and that the belt by which the machine was run was old, worn, defective, and worthless, and defectively laced, and by its inherent weakness and lack of strength the belt could not bear the strain put upon it in operation of the machine, and that consequently, as a result of this defective condition of said machine and belting, plaintiff was injured in the following manner, to wit: He was placed at work feeding the machine, and was working around it with reasonable care in the regular discharge of his duties to his master, when the belting and the end of it flew back and struck him with great force in the face, and destroyed his left eye and its sight forever, and, that, by reason of the negligence of the defendant in failing to furnish the plaintiff with reasonably safe appliances and machinery aforesaid, said plaintiff lost his left eyesight, etc.

We have been so particular in describing the cause of action as set out in the declaration, because the allegations of the declaration are material for the proper consideration of the question presented. There was some evidence to the effect that one Skean was the superintendent of the mill, and that in his absence one Lucius

Magee was the vice principal of the defendant, and that at the time plaintiff was injured he (Magee) was in charge of the planing machine, performing the duties of the superintendent; that the machine choked; that Magee saw the said machine choke, or by the exercise of reasonable care could have seen it, and failed to direct plaintiff how to use the machine. The chief contention of the appellant is the refusal of the court below to grant for him instruction No. 4, which the court declined to do. That instruction is as follows: "The court instructs the jury, for the plaintiff, that if they believe from the evidence in this case, that Lucius Magee, in the absence of Skean, was by the defendant authorized to perform the duties of superintendent, and at the time the plaintiff was injured he was in charge of the planing mill, performing the duties of the superintendent, and saw the machine choke, or by the exercise of reasonable care could have seen it, then it was his duty as superintendent in charge to direct the manner of handling the machine; and if they believe from the evidence, with knowledge of the trouble, he failed and neglected to direct the handling of the machine after it choked, and he left the plaintiff to his own resources, and that the plaintiff was exercising reasonable care and caution, and was injured by the breaking of the belt, which was defective, or defectively laced, then they will find a verdict for the plaintiff, although they may believe the lumber being passed through the machine was too large and choked the machine."

Without passing upon the correctness or incorrectness of this instruction, a sufficient answer to the contention of appellant is that the principle invoked in the instruction is not the ground upon which the plaintiff sought to recover in his declaration. The declaration, as hereinbefore stated, simply charges that the defendant failed to provide the plaintiff with a reasonably safe place in which to work, and failed to furnish him with safe and

sufficient machinery and appliances with which to work, and that the injury sustained was caused by the breaking of the belt, which was worn and defectively laced. A mere inspection of the declaration and of the instruction refused demonstrates the correctness of the court in declining to give the instruction. A party cannot make out one case in his pleading and a different one by his evidence. The case of *Bradford v. Taylor*, 85 Miss. 409, 37 South. 812, which appellant relies upon, is not in point, because the proposition upon which the plaintiff recovered was set forth in the declaration, and there was no variance in the evidence and the allegations in the declaration. The instant case was properly submitted to the jury, and the instruction directed the findings of the jury to the issues presented under the pleadings.

It is urgently insisted that the court erred in giving an instruction to the defendant to the effect that contributory negligence was a defense; and appellant contends that contributory negligence is not a defense, under chapter 135 of the Laws of 1910. The facts in this case are that the injury occurred on the 30th day of March, 1910, and the suit was instituted on January 12, 1911, and chapter 135 of the Laws of 1910 was approved and took effect on April 16, 1910. In other words, the contention is that this act of the legislature had a retroactive effect.

The rule is fundamental, in the construction of statutes, that they will be construed to have a prospective operation, unless the contrary intention is manifested by the clearest and most positive expression, and, further, that such a construction should be placed upon the statute in order to preserve, if possible, its constitutionality; that the legislature has no power to take away vested rights, in order to create a cause of action out of an existing transaction, for which there was at the time of its occurrence no remedy; nor can it destroy a

valid defense to an action existing before the enactment of the statute. These principles are fundamental, and require the citation of no authorities to support them.

The act reads: "In all actions hereafter brought." It may be that this language is sufficiently broad to cover causes of action arising prior to the passage of the act; but our duty is to so construe the act to preserve, if possible, its constitutionality, and, since it is not manifest that the purpose of the legislature was to embrace prior causes of action and thereby destroy vested rights, we must construe the act so as to limit its operation to causes of action arising subsequent to its passage. The law is: "Statutes not expressly made retrospective in terms are otherwise construed, if possible." 8 Cyc. 1022, and authorities cited.

We see no error in the record, and it is affirmed.

Affirmed.

Suggestion of error filed and overruled.

J. R. KELLY ET AL v. BANK OF COMMERCE.

[57 South. 978.]

1. CORPORATIONS. *Sales of stock. Trust. Notes. Liability of maker.*

In a suit against the guarantor of a promissory note given for the purchase of corporate stock it is no defense that the stock was purchased for another corporation, the corporation selling the stock having no knowledge of that fact; in such case, Ch. 88, Sec. 5, Laws of 1900 (Sec. 5005, Code of 1906) providing that "no corporation shall, directly or indirectly purchase or own the capital stock or any part thereof, of any other corporation," etc., having no application.

2. SAME.

In such case where the purchaser signed his promissory note for the purchase price of the stock as "trustee" he is liable as a maker of the note, the word "trustee" not altering his individual liability.

APPEAL from the chancery court of Harrison county.
HON. T. A. WOOD, Chancellor.

Bill by the Bank of Commerce against A. L. Thornton and others. From a decree for complainant, but dismissing the bill as to A. L. Thornton, defendant Kelly appeals and complainant prosecutes a cross-appeal.

On July 26, 1905, A. L. Thornton purchased from the Bank of Commerce eighty shares of stock for the sum of ten thousand dollars; certificates of stock being issued to "A. L. Thornton, trustee." In payment for said stock he gave a note to said bank for the sum of ten thousand dollars payable six months from date, with six per cent. interest, and deposited as collateral the certificate for said shares of stock. Said note was signed, "A. L. Thornton, Trustee." Thornton was the manager of the Union Bank & Trust Company, and it is the contention of the appellant Kelly that this stock in the Bank of Commerce was taken for the benefit of the Union Bank & Trust Company, in violation of the anti-trust statute of 1900, brought forward as Sec. 5005, Code 1906.

Afterwards, on December 7, 1905, said note being still unpaid, an agreement was entered into whereby said note was canceled and the stock certificates delivered to the Union Bank & Trust Company, upon Thornton's executing another note for ten thousand dollars, due six months from date, payment of which was to be guaranteed by J. R. Kelly, who indorsed the note. Contemporaneously with the execution of this note, the Union Bank & Trust Company, by A. L. Thornton, cashier, entered into an agreement with J. R. Kelly to sell Kelly certain described lands, "to be paid for in the following manner: one dollar cash and the payment of a certain note of date December 7, 1905, signed by A. L. Thornton, for the sum of ten thousand dollars," etc. This agreement also provided that the title to the land should be vested in one Tippin, as trustee, to be held by him until said note was paid by Kelly, and, in event he did not pay

same, said trustee was to sell the land and apply the proceeds to the payment of the note. The note was not paid at maturity, and Tippin, the trustee, sold the land for something less than four thousand dollars, and credited this amount on the note.

Thereafter the bank brought suit in the chancery court against Thornton and Kelly and the wife of the latter, to whom Kelly had conveyed certain lands in Harrison county. The bill prayed for a decree against Thornton and Kelly for the amount found to be due, and for a cancellation of the deed from Kelly to his wife, and that a lien should be fixed upon the land transferred by Kelly to his wife, and said land subjected to the payment of the balance on the note. The court found that Thornton was not liable on the note sued on, and dismissed the bill as to him, and entered judgment against Kelly and wife for the unpaid balance of the note, and canceled the conveyance from Kelly to his wife, and subjected the land attempted to be so conveyed to the payment of the amount adjudged against him, and granted Kelly and wife an appeal from this decree, and granted a cross-appeal to the Bank of Commerce against Thornton.

Kelly contended that the note sued upon represented an illegal transaction, void and unenforceable, because it was alleged to be made in violation of chapter 88, Sec. 5, Laws of 1900 (Sec. 5005, Code 1906), because Thornton purchased said stock for the Union Bank & Trust Company, and for the further reason that Kelly was not an absolute, but a conditional, guarantor for the payment of the note; his guaranty being limited by his agreement entered into at the time he indorsed the note.

May & Sanders, for appellants.

Sec. 5 of chapter 88, Laws of 1900, which was in force at the time of the execution of the writings furnishing the basis of this litigation, reads as follows:

“No corporation shall directly or indirectly purchase or own the capital stock, or any part thereof, of any other corporation, nor directly nor indirectly purchase, or in any manner acquire, the franchise, plant or equipments of any other corporation, if such other corporation be engaged in the same kind of business and be a competitor therein. Any corporation offending against this provision shall forfeit its charter, if a domestic corporation, and if a foreign corporation, shall forfeit its right to do business in this state and shall be proceeded against by the attorney general in manner and form provided by section 4 of this act.”

In order to remove any controversy or doubt as to how the said law should be construed and applied, the legislature, out of an abundance of caution, closed the said chapter 88, laws of 1900, with section 11, which reads as follows:

“This act shall be liberally construed in all courts to the end that trusts and combines may be suppressed and the benefits arising from competition in business preserved to the people of this state.”

We ground our argument on this phase of the case upon this postulate—any contract made in violation of the law of the land or in violation of its public policy as shown by the common law, the statutes or the decisions of the courts, is an illegal contract and imports no liability; and this is true whether the same be executed or executory or partly executed and partly executory.

In proceeding to demonstrate the soundness of this contention and to apply the same to the solution of this case, we maintain there is one fact which stands out as the naked truth, as shown by the record, and that is this—the sole and only consideration which ever moved from the Bank of Commerce as an inducement to the execution of the writings sued upon was the sale by it in violation of law, of eighty shares of its capital stock

to the Union Bank & Trust Company, another corporation engaged in the same kind of business and competing with it. We shall discuss the evidence sustaining this contention as we progress with the argument.

Assuming for the present the fact to be as stated, for the sake of argument, we call the court's attention to the leading case in Mississippi, *Deans v. McLendon*, 30 Miss. 343, in which, in an admirable and characteristically lucid opinion, Chief Justice Smith declares the rule to be as follows:

"It is not now to be controverted that no action can be maintained upon a contract the consideration of which is either immoral in itself or prohibited by law, or which is made in contravention of public policy. It is equally well settled that every contract that grows out of or is in connection with an illegal or immoral act is absolutely void and will not be enforced in law or equity.

"Courts of justice in the observance of these rules are not influenced by any consideration of respect or tenderness for the party who insists upon the illegality of a contract; but exclusively by reasons of public policy. The object is to punish the active agent in the violation of a law, by withholding from him the anticipated fruits of his illegal act; and thus deterring all persons from violating its mandates, to give sancity to the law and security to the public."

The action in that case was instituted upon a note given for the purchase money of a slave which had been imported into the state without complying with the requirements of the law and, therefore, in violation of the law. The statute in that case imposed a penalty for the sale of such slaves, although it did not declare that the contract for the purchase money should be invalid, but the court held that that followed as a necessary consequence and they delivered themselves in the following language:

“The illegality and consequent invalidity of any contract made in direct violation of the provisions of this statute, is a question which admits of no debate.”

And the rule thus laid down in *Deans v. McLendon*, *supra*, is cited with approval and reaffirmed in *Bohn v. Lowrey*, 77 Miss. 424. See also, 9 Cyc. 475.

In *Bank v. Owens et al.* (U. S.), 7 L. Ed. 508, which was a suit to recover on a note in which usurious interest was reserved contrary to the charter provisions of the bank which prohibited the charging of usurious interest, the court held the contract void and denied a recovery and, among other things, they say (p. 512): “The question then is whether such contracts are void in law upon general principles. The answer would seem to be plain and obvious—that no court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they then become auxiliary to the consummation of violations of law?

To enumerate here all the instances and cases in which this reasoning has been practically applied would be to incur the imputation of vain parade. There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal.”

No rights accrue from an unlawful contract. *Gibbs v. Consolidated Gas Co.* (U. S.), 32 L. Ed. 979.

The general rule is that courts will not aid parties to illegal contracts, which are executory only, to recover thereon; and where the contract is executed a court will not aid a *particeps criminis* in setting it aside. *Capehart v. Rankin*, 100 Am. Dec. 779.

Neither a court of law nor of equity will entertain the suit by either party to an illegal contract against the other when the contract is against public policy, whether it is executory or executed; and whenever a party seeking to recover is obliged to make out his case by show-

ing an illegal contract, or through the medium of such contract, or when it appears that he was privy thereto, he is not entitled to any expenditure made by him, in connection therewith or money due him as profits derived therefrom. *Woodson v. Hopkins*, 85 Miss. 171, 37 South. 1000, 107 Am. St. Rep. 275.

The case of *Woodson v. Hopkins*, *supra*, would seem to set at rest forever in Mississippi any distinction between contracts executory and contracts executed, where the consideration for the contract is illegal and the party seeking to recover is obliged to make out his case by showing such illegal contract or where he must proceed through the medium of such contract.

J. L. Taylor & T. H. Barrett, for appellee.

In answer to appellant's first argument, will say:

1. The Bank of Commerce did not know it was selling the stock to the Union Bank & Trust Company.

2. The evidence shows that the Union Bank & Trust Company was really and truly not a bank at all; no one ever saw a check given on it; of course it was not a bank.

3. As a matter of common knowledge and this court can see from the record the Union Bank & Trust Company was nothing in the world but A. L. Thornton and a clerk to assist A. L. Thornton in dodging taxation.

4. Even though the sale of the stock had been made by the Bank of Commerce to a competing corporation, yet Sec. 5005 of the Code of 1906 would not apply because the Bank of Commerce was the selling corporation which said statute does not prohibit buying stock and said statute is a penal statute, and penal statutes are strictly construed except as provided in section 5021 where it is expressly provided that this chapter should be liberally construed to the end and for the purpose of suppressing combines; not, however, to be construed liberally for the purpose of aiding the largest stockholder in a bank in defrauding said bank, or in aiding a director

of said bank in conspiring with the largest stockholder in a bank in defrauding the unsuspecting stockholders, which would be the effect if in this case the said Thornton, owning \$10,000 worth of stock of the bank and the said J. R. Kelly who was a director (probably elected by the stock of his intimate friend Thornton)—if they are now allowed to take advantage of what they are pleased to term a violation of the law.

Ford, White & Ford, for cross-appellee.

The contract for the stock purchased was void because in contravention of the antitrust statute.

Section 5 of the antitrust statute of 1900 is as follows:

“Section 5. No corporation shall directly or indirectly purchase or own the capital stock, or any part thereof, of any other corporation, nor directly or indirectly purchase, or in any manner acquire the franchise, plant or equipments of any other corporation, if such other corporation be engaged in the same kind of business, and be a competitor therein. Any corporation offending against this provision shall forfeit its charter, if a domestic corporation, and if a foreign corporation, shall forfeit its right to do business in this state, and shall be proceeded against by the attorney-general in manner and form provided in section 4 of this act.”

Section 3 of said act renders all contracts in violation of it void. The testimony does not show that Tomlinson and Tippin did not know for whom Thornton was trustee in the purchase of the stock from the bank; but even if their ignorance of this fact could, under any circumstances, make valid an otherwise void contract, the testimony leaves little room to doubt that they either knew for whom he was trustee, or were intentionally and purposely ignorant of the fact in order to give validity to the transaction.

It is true that Tomlinson on his redirect examination, in response to carefully worded questions from the

bank's attorney, denied that he knew that Thornton purchased the stock for the Union Bank & Trust Company; and it is also true that after having testified on December 29, when he was recalled to the witness stand on January 6 for cross-examination by counsel for cross-appellee Thornton, his mind had become a perfect blank so far as any knowledge as to whom Thornton represented in the purchase of the stock of the Bank of Commerce was concerned. But, unfortunately for cross-appellant, before this witness became aware of the danger of that testimony, he repeatedly admitted that the Union Bank & Trust Company bought this stock and repeatedly testified to that fact.*

MAYES, C. J., delivered the opinion of the court.

We have given to this record most careful examination. It is our judgment that the court made but one error, and that consists in not giving judgment against Thornton also. The trial court settled the facts, and was fully justified in the conclusion both that the Union Bank & Trust Company was not the purchaser of the stock, and that, if this is not the true state of facts, then the Bank of Commerce had no knowledge that the Union Bank & Trust Company was the purchaser, if in truth it was. This being the case, Sec. 5005 of the Code of 1906, providing that "no corporation shall, directly or indirectly, purchase or own the capital stock, or any part thereof, of any other corporation, nor directly or indirectly purchase, or in any manner acquire, the franchise," etc., is not involved under the facts.

The decree of the chancellor is correct in all save the dismissal of the suit against Thornton.

On direct appeal the case must be affirmed, and on cross-appeal reversed and remanded.

Affirmed on direct appeal.

Reversed and remanded on cross-appeal.

J. W. ROSAMOND v. CARROLL COUNTY ET AL.

[57 South. 979.]

1. ACTION. *Damages. Nuisance. Successive recoveries. Judgment bar. Pleading. Exception.*

The erection of an embankment which causes the obstruction of the natural flow of water and causes damages to the land of another is a continuing nuisance for which successive recoveries can be had.

2. JUDGMENT. *Operative as bar. Prospective damages.*

A declaration, upon which a former recovery was had for damages for a continuing nuisance caused by the erection of an embankment which stopped the natural drainage of water and caused it to overflow plaintiff's land, did not seek to recover prospective damages, although it alleged that the land was permanently damaged; this simply meant that the damage then accrued was permanent—that the reduction in value of the land was permanent and such former recovery is not a bar to damages afterwards accruing from subsequent overflows.

3. PLEADING. *Exception.*

Exceptions to an answer lie only to an insufficient discovery, and not to the legal sufficiency of matter set up therein as an affirmative defense to the relief prayed for.

APPEAL from the chancery court of Carroll county.

HON. J. F. MCCOOL, Chancellor.

Suit by J. W. Rosamond against Carroll county and another. From a judgment for defendants, plaintiff appeals.

This suit was begun in the chancery court by the appellant, who sought to recover damages of the county of Carroll and one Briscoe, who owned property adjacent to that of appellant. The bill alleged that defendant Briscoe, with the consent of the county and in utter disregard of complainant's rights, had thrown up an embankment on his own lands, thereby causing damage

to plaintiff's lands by overflow. The bill itself shows that the embankment was erected about 1901, and that in 1902 appellant brought suit against the county in the circuit court and recovered a judgment for five hundred dollars for damages at that time to the identical land caused by the building of this same embankment. The bill alleged, however, that the damage was a continuing one, and that complainant was entitled to recover for whatever damage was done to his crops by each and every overflow. The answer of the defendants is a general denial, and charges that the recovery in the circuit court in 1902 included all damages, both those which accrued before the rendition of the judgment and those to accrue thereafter. The plaintiff excepted to that portion of the answer which related to the judgment of the circuit court. The court overruled the exceptions, and the appellant prosecutes an appeal from this interlocutory decree.

Coleman & McClurg, for appellant.

Jack Thompson, assistant attorney-general, for appellee.

No brief of counsel on either side found in the record.

SMITH, J., delivered the opinion of the court.

The nuisance complained of is a contingent one for which successive recoveries may be had.

It is unnecessary for us to decide whether a party can in one suit recover all damages, present, past, and prospective, sustained and to be sustained, from a nuisance of this character, for the reason that the declaration upon which appellant's former recovery was had did not seek to recover prospective damage. It is true that it alleged that the land was permanently damaged, but that simply meant that the damage then accrued was permanent—that the reduction in value of the land was

permanent. The land might be permanently damaged by each successive inundation. Appellant's former recovery, therefore, is not a bar to the present action.

This cause comes to us on an appeal from a decree of the chancellor overruling exceptions to affirmative matter set up in an answer as a bar to the relief prayed for. Exceptions to an answer lie only to an insufficient discovery, or to scandal and impertinence, and not to the legal sufficiency of matter set up therein as an affirmative defense to the relief prayed for. 1 Pleading & Practice, 898; 16 Cyc. 315; Puterbaugh's Chancery Pleading & Practice (5th Ed.) 143; *Bower Barff Rustless Iron Co. v. Wells Rustless Iron Co.* (C. C.), 43 Fed. 391. No objection on this point, however, has been made by counsel for the appellee, and we will not in this instance raise the point ourselves.

The decree of the court below is reversed, and the cause remanded.

Reversed and remanded.

AETNA INDEMNITY CO. v. STATE FOR USE OF EVA MAE
GILLASPY ET AL.

[57 South. 980.]

1. GUARDIAN AND WARD. *Bond. Liability covered. Conversion. Bond given after actual conversion. Code 1906, Sec. 2407.*

Where a chancery court proceeding under Sec. 2407, Code of 1906, requires a guardian to execute a new bond, such new bond has no retrospective effect unless such bond plainly indicates an intention that it should have such effect.

2. SAME.

Where it is plain that a guardian converted the funds of his ward to his own use while acting as guardian under the first bond and afterwards gives a second bond, the sureties on the second bond are not liable for such conversion but the sureties on the first bond are liable.

3. SAME.

Where when the second bond was given the actual conversion of the wards' property had taken place under the first bond, but the guardian was solvent and fully able to pay the amount then due the wards and the amount was lost to them because the guardian failed and neglected to pay over the amount to them as he should have done, in such case the sureties on the second bond are liable, as well as the sureties on the first bond.

4. GUARDIAN AD LITEM. Next friend. Actions.

When a person bringing suit for a minor ward styles himself in the pleadings as "guardian *ad litem*," when in fact he is suing as "next friend," he will be treated as such and the courts will not look with critical eyes on the characterization which the next friend chooses to give himself in the pleadings.

APPEAL from the chancery court of Newton county.

HON. SAM WHITMAN, JR., Judge.

Suit by the state for the use of Eva Mae Gillaspy and others against the Aetna Indemnity Company and others. Judgment for plaintiffs against the Aetna Indemnity Company and suit dismissed as to the other defendants. The Aetna Indemnity Company appeals and plaintiff prosecutes a cross-appeal.

The facts are fully stated in the opinion of the court.

W. I. Munn and Amis & Dunn, for appellant.

The case of the *State v. Shackelford*, reported in 56 Miss, 648, and the case of *McWilliams v. Norfleet*, reported in 60 Miss. 987, both hold that the surety on a substituted guardian's bond is not liable for defaults or conversions occurring before the execution of the bond; and the case of *State v. Shackelford*, *supra*, further holds that since the surety is not liable for the value of the property or money converted by the guardian to his own use, the surety is not liable for the failure of the guardian to render an account of it. These cases, so far as we know, have never been criticised or overruled, and are the law in this state at the present time; and if so, then the Indemnity Company is not liable for the

default of the guardian in converting said sum of one thousand seven hundred twelve dollars and thirteen cents belonging to each of his wards, prior to the execution of the substituted bond, nor is the Indemnity Company liable for the failure of the guardian to render an account of the sum so embezzled by him.

The above cases, as we understand it, dispose of the first two questions above stated, and the only remaining question is as to whether or not the Indemnity Company is liable for the failure of the guardian to collect from himself, as an individual, the sum previously converted to his own use.

The case most nearly analagous to the proposition last above presented, is the case of *McWilliams v. Norfleet*, reported in 63 Miss. 183. The facts of that case were as follows:

“In 1869, R. A. Roberts was made the guardian of Belle T. Means and her two sisters, minors, and executed the required bond. In 1872, Roberts and Anderson entered into a partnership for the purpose of carrying on a general merchandise business. Roberts, without any order of court, loaned the firm of Roberts & Anderson, of which he was a member ten thousand dollars of money belonging to his wards, taking the note of the firm therefor, payable to him, as guardian. In February 1873, R. E. Chew was taken into the firm as an equal partner, and the business of the old firm merged into that of Roberts, Anderson & Chew. In April 1873, Roberts, of his own motion, appeared before the court and executed a new guardian's bond with J. P. Norfleet, R. O. Woodson, J. R. Daugherty, W. S. Puryear, J. D. Fennell, and Jas. B. Potts as sureties. Both Roberts and Anderson were solvent long after the execution of this new bond, but Roberts made no effort to collect the note.

In 1880, Roberts, and the firm of which he was a member, failed. Mrs. Belle T. McWilliams, formerly Belle

T. Means, exhibited a bill against Roberts, praying for a final settlement of his account as guardian, and made the sureties on the second bond parties to the suit."

In passing upon the facts of that case, the supreme court speaking through Arnold, J., holds the following language:

"A guardian's bond imports responsibility for losses occasioned by negligence or inattention, as well as for the corruption of the guardian. It cannot be that a breach of the first bond confers an infraction of the latter. They are liable not only for the money and assets of the wards' estate, which actually came into the hands of Roberts, but also for such as he might and could have collected and reduced to possession by a faithful administration of his office. Any other doctrine would be a novelty in the law in relation to guardians and trusts.

"The record shows that when the second bond was executed Roberts sold a note for ten thousand dollars payable to him, as guardian, made by a solvent firm of which he was a member, for money of his wards previously lent him without an order of the court for that purpose, and that for several years afterwards the note could unquestionably have been collected by proper attention, and that Roberts made no effort whatever to collect the note and that the money due thereon was lost. The sureties on the second bond are liable for the amount of the note and interest thereon at ten per cent, as well as for other money collected by the guardian; they became sponsors for his fidelity."

As we understand it, the difference between the case just quoted from and the case at bar, is this, to-wit: That in the McWilliams case, the guardian had dealt with the fund in his hands as trust funds. He had loaned the money at interest to the firm of Roberts & Anderson, and had taken the note of Roberts & Anderson for the amount loaned, payable to himself, as guar-

dian. In that case, there was all the time a trust fund of ten thousand dollars actually in existence, represented by the indebtedness of the firm of Roberts & Anderson to the guardian, as evidenced by the note payable to Roberts as guardian. There was no conversion of the fund at all, but there was simply a loan made by the guardian of the funds of the wards, without authority of court, and all the duty that he owed was the duty of using reasonable diligence in the collection of the amount due on this note; and the court held that because he could have collected it, and made no effort to collect it, he and his sureties were liable for the amount of the note, which was lost. In other words, the court placed the ground of liability in that case on the negligence of the guardian in failing to collect a note payable to himself, as guardian, and the same result would have been reached and the same rule applied, if the court, in the first instance, had authorized the guardian to make the loan that was made, or any other loan.

In this case, however, there was not at the time of the execution of the substituted bond, any trust fund in existence, excepting the sum of one hundred and ten dollars and sixty-eight cents for each of the wards. The guardian had long prior thereto embezzled and converted all the funds in his hands to his own use, excepting the said sum of one hundred and ten dollars and sixty-eight cents for each of his wards. He did not recognize or treat any sum other than the one hundred and ten dollars and sixty-eight cents as trust funds. So far as the estate of the wards was concerned it had been wholly confiscated and embezzled prior to the execution of the substituted bond, with the exception of the said sum of one hundred and ten dollars and sixty-eight cents; and because of that fact the guardian and the sureties on his original bond had become and then was absolutely and unconditionally liable to the wards for the conversion and confiscation of their estate, and no

order of the court made *ex parte* could relieve them or either of them from this liability.

In the McWilliams case, at the time of the execution of the substituted bond, Roberts, as guardian, held, as guardian, a note payable to himself, as guardian, for ten thousand dollars which was a part of the assets of the estate of his wards in his hands, for which he was bound to account to the court, and touching the collection of which, it was his duty to exercise reasonable care and diligence.

In this case, at the time of the execution of the substituted bond, there was nothing in the hands of the guardian, as guardian, excepting the sum of one hundred and ten dollars and sixty-eight cents for each of his wards. He did not recognize the funds in his hands as trust funds at all, but claimed and used, and continued to claim and use the same as his own property and not as the property of his wards. The liability of himself and the sureties on his original bond had become fixed and absolute and nothing was ever done by the guardian or any one else to change that status in the least. The liability of the sureties on the original bond could not be shifted to the surety on the substituted bond by an *ex parte* decree of the court, or by any other act short of a special undertaking on the part of the surety in the substituted bond to that effect. It seems to us that there is no escape from the proposition that the sureties on the original bond are liable to the wards for the conversion of the funds by the guardian prior to the execution of the substituted bond. And if court should also hold that the surety in the substituted bond is also liable because of the failure of the guardian to collect the amount so embezzled by him, from himself, then the effect of such holding will be that the substituted bond was not, in fact, a new or substituted bond at all, but was an additional bond or security.

J. R. Byrd, for appellees and cross-appellants.

This is a three cornered fight; the appellant, the Aetna Indemnity Company, contends that it is not liable but that cross-appellants, J. B. McAlpin et al., are liable, and J. B. McAlpin et al., cross-appellees, contend that they are not liable but that the Aetna Indemnity Company appellant, is liable, and appellees contend that they are both liable to them.

The proof in this case established beyond a doubt that G. M. Gillaspy, guardian, was abundantly able to pay to his said wards every cent he was due them from the time he became guardian up to a few months before his death. That at the time the Aetna Indemnity Company's bond was given, he was solvent and was ready and willing to settle with his wards or the court, had he been required to do so.

Counsel for appellant seem to think that because the guardian deposited the money in the bank in his own name and then drew it out in his own name, he, therefore, embezzled the money before the giving of the bond by appellant, and it is therefore not liable. This reasoning is manifestly unsound; when he placed the money in the bank to his individual account it necessarily follows that he must draw it out in his individual name. As to whether he drew it out of the bank for the purpose of investing it, as the law requires him to do, for the benefit of his wards, the record is silent. The only penalty visited upon him for this neglect of duty is fixed by the section of the Code just quoted. This penalty, visited upon the guardian for using and mingling his wards' property with his, is upheld in the cases of *Garland v. Norman*, 50 Miss. 238; *Boyd v. Hawkins*, 60 Miss. 277; *Jamison v. Glover*, 46 Miss. 510.

It is an elementary principle of law that the bondsmen of a guardian are liable for the neglect or failure of the guardian to collect any outstanding indebtedness due the ward where the same could have been col-

lected, had he exercised reasonable diligence. It is as much the duty of the guardian to collect outstanding debts as it is to protect and care for that which is in his possession. A guardian failing in this is liable on his bond for any sum he might have collected by the exercise of reasonable diligence. G. M. Gillaspy, the individual, and G. M. Gillaspy, the guardian, in law, are two separate and distinct individuals. When he was acting in the fiduciary character as guardian he must deal with claims, debts, etc., held against his wards' estate by himself in the same manner as if they were held by strangers, and failing to do so and loss occurs, his bondsmen must make it good. Under the testimony in this case there cannot be a shadow of a doubt, that at the time of the giving of this bond by appellant, the Aetna Indemnity Company, and for a long time thereafter, G. M. Gillaspy, guardian, could have collected every dollar of this money, out of G. M. Gillaspy, the individual, and failing to do this he breached his bond and appellant is liable for said breach. If the guardian still had the funds in his power, though he had already wrongfully used or converted them, he will be liable for them on the new bond. Can there be any doubt, in this case that this guardian still had these funds in his power in view of the testimony in this record. I quote the following from the 15th volume, pages 116 and 119 of 2nd edition of the American and English Encyclopedia of Law. "Additional and Substituted Bonds,—Where additional bonds are required and given, the former bond continues to be security for the entire management of the estate. If the new bond is a substitution for the old, instead of an addition to it, though the old bond may be discharged upon the substitution, the sureties continue to be liable for any default already committed, but not for subsequent defaults. The carrying forward into later balanced sums already converted which are lost, will not relieve the sureties on the for-

mer bond from liability. In either case the new bondsmen are liable for all defaults which occur after the giving of their bond, and if the guardian still has the funds in his power, though he had already wrongfully invested or converted them, he will be liable for them on the new bond; so he will be liable on such bond for a former misappropriation if he carried forward the balance to his later account."

The authority just quoted holds that "if the guardian still has the funds in his power, though he had already wrongfully invested or converted them, he will be liable for them on the new bond." This doctrine is upheld in the case of *Parker v. Medsker*, 80 Ind. 155; *State v. Dennis*, 58 Mo. App. 568; *Clark v. Wilkerson*, 69 Wis. 543. We contend that under the state of facts shown by the record in this case that the new bond is not alone liable but that the old one is equally liable because if there was a conversion prior to the giving of the new bond or if the placing of the money in the bank by the guardian to his individual credit was a misappropriation thereof, then that alone makes the old bondsmen liable to the full penalty of their bond; or if they failed to show what became of the one hundred and ten dollars and sixty-eight cents shown to be in the hands of the guardian on November 20, 1902, the old bondsmen are liable for that.

This guardian filed a second and last annual account on the 20th day of November, 1902. This was long before the giving of the new bond. He never at any time after the 20th of November, 1902, filed an annual account notwithstanding the law explicitly requires a guardian to report at least once every year, nor did his bondsmen make a report after his death as required by law. Every guardian is required under the law, to make a true account and if he fails to do so and a loss is occasioned thereby, he is liable on his bond. One of the conditions of every guardian's bond is, that he shall make

true accounting, and if it is not written on the face of the bond, the law writes it there. If he fails to comply with this requirement the bond is breached and all losses sustained are recoverable from the bondsmen. And this is the only sane and reasonable rule.

I quote the following from the 15th volume of the American and English Encyclopedia of Law, page 119, 2nd edition: "But whether the guardian is in any event liable on the new bond for the entire funds of the estate, though the loss occurred before the giving of the new bond and though the balance was not carried forward to the later account, is a question upon which the authorities are not entirely harmonious. The prevailing rule holds him liable on the grounds of his obligation to make true account, but in a few jurisdictions the contrary rule prevails." This is the rule laid down by the courts of all the states, except perhaps Indiana and Mississippi. The case of *Parker v. Medsker*, 80 Ind. 155, seems to be in conflict with *Armstrong v. State*, 7 Blackf. (Ind.) 81 and the cases of *McWilliams v. Norfleet*, 60 Miss. 987; *State v. Shackelford*, 56 Miss. 648, seems to be somewhat in conflict with *Hull v. State*, 53 Miss. 262. The Mississippi cases just referred to were decided under a different statute to the one under which we are now operating. This perhaps, is the reason why our court seems to have gotten out of line, on this proposition, with the great weight of authority. Sec. 17, Art. 145, Code of 1857, speaking of guardian's bond concludes with these words, "and a new guardian appointed by the new bond shall only operate for the future, the original sureties being bound for all breaches of the first bond." Sec. 1212, Code of 1871, uses this language: "If the new bond be given, the sureties on the former bond shall not be liable thereon, except as to all acts of the guardian up to the time of executing the new bond." Sec. 2101, Code 1880, concludes with these words, "But the new sureties shall only be bound for

the future, the original sureties being bound for all breaches, of the first bond." This idea of the statute was left out of the Code of 1892, Sec. 2190, and the Code of 1906, Sec. 2407. The statute under which we are now operating reads as follows: "The court by which a guardian was appointed, may, for sufficient cause, remove him after having him cited to appear; and if the court should ascertain that the surties of a guardian were insufficient at the time the bond was executed, or have since become so, or are of doubtful solvency, it may require the guardian to give a new bond; and if he refuse or neglect to do so, he may be removed. If the sureties of any guardian apprehend danger and desire to be discharged, they may petition the court for that purpose and the guardian shall be cited; and if, on hearing the court should be of opinion that the complaint is well-founded, the guardian may be required to give a new bond, and, on failure to do so, may be removed." In the case of *Matthews et al. v. Malden et al.*, 4 Am. and Eng. Ann. Cas. 344, the court held, "When the sureties on the bond of a guardian petition the probate court that the guardian give a new bond and a new bond is filed, the sureties on the old bond are liable for any devastavit prior to the approval of the new bond. But in such a case the sureties on the new bond are liable for a conversion of the trust funds before the making of the new bond, upon the ground of the guardian's obligation to make true account." This case is almost identical with the one under consideration. I respectfully call the court's attention to the notes cited under this Alabama case and especially to the reference made to Mississippi statute.

Counsel devote a great deal of their brief to the question of the guardian *ad litem*. I deem it useless to discuss this proposition at any length. He is clearly mistaken as to how the suit was brought. This case is in the name of the state of Mississippi for the use and

benefit of the two minors, Eva Mae Gillaspy and Garland Gillaspy, and Leila Gillaspy Rivers, an adult, and as to whether the name of the guardian *ad litem* appears or does not appear is wholly immaterial. This question was raised in the lower court by a general demurrer and the court very properly decided that there was nothing in the proposition, and if there was it could not be reached by a general demurrer, such a demurrer as went to the whole bill. I deem it useless to discuss this question to any great length or to cite authorities.

The demurrer of appellant went to the whole bill; certainly Mrs. Leila Gillaspy Rivers who was an adult at the time of filing the bill, had a right to maintain her action against the appellant. It would have been manifestly wrong for the chancellor to have sustained the demurrer and dismissed the bill. If appellant really desired to have the bill dismissed because J. R. Rowzee's name appeared therein, as guardian *ad litem*, a special demurrer should have been filed. If there is any merit whatever in counsel's contention on this point, he is too late, the opportune time has passed. What difference could it possibly make whether Rowzee is designated as guardian *ad litem* or next friend. Appellants cannot possibly suffer by reason of him being designated as guardian *ad litem*; if he was designated as next friend he would be under no bond.

The question of the liability of appellant and the question of the guardian *ad litem* are the only questions argued in appellants' brief and I assume that they have abandoned all other questions, if there be any shown by the record.

Byrd & Wilson, for cross-appellants.

At the time the new bond was executed and up to the time shortly prior to his death, the said Gillaspy was amply able to pay all sums due these minors, and could have been made to pay them had he been compelled to

do so. No other sensible conclusion can be reached touching the liability of the surety on the last bond for the entire loss due said minors than that the estate was squandered and lost after the new bond was given, and was so squandered and lost because the said guardian did not comply with the obligations of his bond and the law in accounting faithfully to the court for his conduct in the administration of the said estates.

To sustain this contention, we have only to cite the court to the authorities in the brief filed for the benefit of the said minors by appellee and cross-appellants in this cause.

See Sec. 2407, Code 1906, Sec. 2190, Code 1892, as compared to similar sections of Code of 1871 and 1880. *McWilliams v. Norfleet*, 60 Miss. 987 and 63 Miss. 183 as well as the Alabama cases and notes thereunder, relied on by counsel for direct appellants, support our contention.

The contention that the guardian converted the estate of the wards to his own use by placing the check received for timber in the bank to his own credit and drawing the same out on his individual check, is wholly untenable for the reason that he comes into court after that and files his inventory, and is charged up with the full amount due each of said wards on account of the said timber. Then, too, the check was made payable to him individually, he having an interest in the said timber; and if he placed the same in the bank to his own credit, as he had a right to do, then he had an equal right to check it out in his own name.

The proof is overwhelming that the sureties on the first bond required a regular accounting to be made to the court and that the surety on the last bond failed to do so. Also the surety on the last bond made an investigation of the solvency of the said guardian, and of the condition of the said estate at the time the new bond was executed and with full knowledge of the facts, it

executed a bond in a sum sufficient to cover the entire estate. Also, that the said guardian was amply able at the time the new bond was given to have made full and complete settlement with each of said minors, had he been required to do so by the court or by the surety on the last bond; and not having made any effort to have a proper accounting made to the court or a proper settlement made with said minors, as required by law and by the obligations of the new bond, the said Aetna Indemnity Company is liable for the entire loss, and the chancellor's finding in this cause should therefore be affirmed.

MAYES, C. J., delivered the opinion of the court.

On the 27th day of June, 1899, G. M. Gillaspy was appointed as guardian of his three minor children by the chancery court of Newton county. At the time of the appointment there seems to have been very little personal estate for him to take charge of, and the court required only a five hundred dollar bond to be executed for each child. It appears that each of these bonds had the same sureties. It appears that, after the guardian assumed the duties as such, he paid little attention to his accounting with the court for a long while, and there seems not to have been much necessity for the same, since little money came into his hands which required accounting to the court, and the court itself seems to have made some orders excusing the guardian from accounting. None of these things become of importance in deciding this case, so we give this only passing notice.

In December, 1905, the guardian received for each of the wards seventeen hundred, twelve dollars and thirteen cents, as the proceeds of the sale of their interest in certain timber sold to a lumber company. The validity of this sale is not drawn in question. When this amount due each ward was received by the guardian, he was only

under a bond of five hundred dollars to each ward, and, although the guardian filed an inventory in the court on December 25, 1905, reporting the sale, and disclosing that on December 1, 1905, he had received for each of his wards the amount of seventeen hundred, twelve dollars and thirteen cents, the court did not at that time require any additional bond, although the guardian's report showed that he held three times as much money for his wards as his bonds covered. On May 13, 1907, nearly eighteen months after the filing of the inventory showing the sale of the wards' property, and when this amount had been in possession of the guardian since December 1st under the five hundred dollar bonds, it appears that an application was filed by the sureties on the first bonds, seeking to be released therefrom, and the court made an order that the sureties on the first bonds be relieved from further liability, and that a new bond be executed, which was accordingly done on the 13th day of May, 1907. This new bond was executed in the sum of six thousand dollars, and was given as a security for all three of the children. Accordingly, after the execution of the new bond, the guardian, without ever having made any settlement of his accounts up to this time under the old bond, was continued as guardian under this bond until some time in 1910, when he died.

It indisputably appears that when the guardian sold the timber to the lumber company, in December, 1905, he received therefor the sum of twelve thousand, four hundred dollars, one-seventh of which, or the sum of seventeen hundred, twelve dollars and thirteen cents, belonged to each of the wards. It further appears that the whole amount, including the minors' interest, was deposited in the Bank of Decatur to the individual credit of G. M. Gillaspy, then engaged in a mercantile business, and all of said money was checked out to pay for the different indebtedness and for investments in conducting the business in which Gillaspy was engaged at the time, and

that this was done between December 1, 1905, and May 13, 1907, the date of the new bond. In other words, Gillaspy took this whole sum and treated it as his own, and converted it to his own use and disposed of it prior to the giving of the second bond, and that he had not only done this, but that he had overdrawn some four thousand dollars. While the record unquestionably shows that while acting under the first bonds he had converted to his own use the money belonging to his wards, it also appears that on May 13, 1907, when this bond was executed, Gillaspy was still solvent and worth several thousand dollars more than was due his wards. Therefore, when he executed this second bond, he was indebted to his wards for the amount of money which he had converted, and he was amply able to have paid their claim. It appears that in the latter part of the year 1909, and nearly two years after the giving of the second bond, and without ever having made any accounting to the court of the money of the wards previously converted by him, Gillaspy became insolvent, and in the early part of 1910 was put into bankruptcy, dying about May of the same year.

After his death a suit was instituted by J. R. Rowzee, in behalf of the wards and describing himself in the suit "as guardian *ad litem*." This suit is instituted in the chancery court against the bondsmen on both bonds, seeking to hold both sets of sureties liable. The case was heard, and the chancery court held that the second bond alone was liable for the indebtedness due by the guardian to the wards, and dismissed the suit as to the sureties on the first bonds. From this judgment the Indemnity Company prosecutes a direct appeal, and the so-called "guardian *ad litem*" prosecutes a cross-appeal. The bond company contends that the first bond is liable alone, and the "guardian *ad litem*" claims that both bonds are liable. The question is whether or not the first bond is liable to the exclusion of the second, or

whether or not the second bond is liable to the exclusion of the first, or whether both bonds are liable. It appears that the total sum due all the wards is over eight thousand dollars; more than the total amount of both bonds; the second bond being for six thousand dollars and the first three bonds each being for the sum of five hundred dollars. We want to emphasize the fact that, although it appears that the actual conversion of the property by the guardian took place while he was acting as guardian under the first bonds, yet at the time the second bond was given, and for nearly two years after the guardian entered upon his duty as guardian under the second bond, he was solvent, and the amount due the wards could have been made out of him at any time up to the latter part of 1909.

It appears from the record that the sureties on the first bonds applied to the court, under the authority of Sec. 2407 of the Code of 1906, authorizing the court, on petition of the sureties, to require the guardian to execute a new bond. It is practically conceded on both sides that this petition was filed, and that the court required the execution of a new bond. No question is raised as to the validity of the court's action in this regard. The order is made by the court on the 13th day of May, 1907, and recites that "it is ordered by the court that the sureties be relieved from further liability on said bond, and that the new bond be recorded." From the order made by the court it plainly appears that a new bond, and not an additional bond, was taken, and it is also plain that this new bond was intended to be a security for further and not past derelictions of duty on the part of the guardian. In the case of *State v. Shackelford*, 56 Miss. 648, this court held that a guardian's bond had no retrospective operation, unless such bond plainly indicates an intention that it should have a retrospective effect. To the same effect are the cases of *Lewenthal v. State*, 51 Miss. 645; *State v. Hull*, 53

Miss. 626; *McWilliams v. Norfleet*, 60 Miss. 987; *McWilliams v. Norfleet*, 63 Miss. 183.

In view of the above decisions, and since it is plain that the guardian converted the funds of the wards to his own use while acting as guardian under the first bonds, it must follow that appellant is not liable on its bond for the actual conversion of the funds; but the first bondsmen are, and the court erred when it dismissed this suit as to them.

This breach having occurred while the first bonds were current, those bonds are liable to all damages that accrue to the wards on account of that breach; but this conclusion does not result in releasing the sureties on the second bond. The amount of both bonds is not sufficient to make the wards whole, so there can arise in this case no conflicting rights as between the bondsmen themselves, or as to their liability between themselves. While the court held in the case of *McWilliams v. Norfleet*, 63 Miss. 183, when it was before the court for the second time that the new bond of a guardian was prospective, and not retrospective, it also held that a guardian's bond "imports responsibility for losses occasioned by negligence or inattention, as well as for the corruption, of the guardian. It cannot be that a breach of the first bond confers any immunity upon the sureties on his second bond for an infraction of the latter. They are liable not only for money and assets of the wards' estate which 'actually came into his hands' after the second bond was executed but, also for such as he might and could have collected and reduced to possession by a faithful administration of his office. Any other doctrine would be a novelty in the law in relation to guardians and trusts." And the court further holds that it is the duty of a guardian, whether acting under a first or a second bond, to "exercise reasonable care and diligence in the management of the wards' estate, to collect debts and securities belonging to the estate, and to administer the

trust confided to him for the benefit of the wards, and not for the advantage of himself." In the *McWilliams case*, 63 Miss. 183, after declaring the above rule of law, the court held the second bond of a guardian liable for the failure of the guardian to collect from himself and partners, while solvent, a note which was lost to the wards on account of this neglect and the subsequent insolvency of himself and partners, although it appeared that the improper dealings with the fund of the wards took place under a former bond. This rule was declared in the cases of *Crumpp v. Geroch*, 40 Miss. 765; *Banks v. Machem*, 40 Miss. 256; *Moffatt v. Loughbridge*, 51 Miss. 211, and in *Ames v. Williams*, 74 Miss. 404, 20 South. 877. The law announced by the above cases is the universal law, so far as we have been able to ascertain it.

When this second bond was given, although the actual conversion of these wards' property had taken place under the first bond, the guardian was solvent and fully able to pay the amount then due the wards. The amount was lost to them because the guardian failed and neglected to pay over the amount to them as he should have done, and it was because of this neglect that they lost their money. It is true that in this case it was a debt owing by the guardian to the wards and not the debt of a third party. It is also true that the neglect of the guardian was the failure to pay over for the wards, while he was solvent, and from himself, a sum of money which he had converted, and which belonged to them. But this fact can not affect the legal principle. The duty imposed by law for him to protect his wards from loss by neglect to exercise reasonable diligence to collect debts owing to them, rested more heavily upon him when he was their debtor by his own wrongful act than it would if he had merely failed to collect a debt from some third party. Under these circumstances the law would hold his bondsmen liable under a state of facts

that might exculpate them under other circumstances. A rule of law that would exculpate a guardian for failing to collect from himself when he had wrongfully converted the funds of his ward, merely because the debt was owing by him and he as an individual would have to make the payment to himself as guardian, would be a perversion of the right, and we apprehend that no court will ever so hold. Of course, it must appear in every case that the guardian was solvent and could have been made responsible during the currency of the second bond. In short, it must be shown that the wards have actually suffered loss by reason of the neglect. If it were shown that the guardian was insolvent, and that at no time during the life of the second bond could the amount have been collected, the second bond would not be liable for the neglect, because no damage was done by it.

In the case of *Johnson v. Hicks*, 97 Ky. 116, 30 S. W. 3, the court held that, "if one was solvent when he qualified as guardian, a note then due from him to the wards' estate will be treated as cash assets, rendering the sureties on his bond liable for the amount of the note," if he subsequently becomes insolvent without having paid the ward the amount due him, the bond is liable for this failure on the part of the guardian to do his duty and collect the debt, and, of course, it can make no difference whether the debt due the ward is a note or on open account. The evidence of the indebtedness does not affect, in any way, the liability of the bondsmen for same. So, also, in the case of *U. S. Fidelity & Guaranty Co. v. State*, 40 Ind. App. 136, 81 N. E. 226, it is held that "where one is appointed guardian of a minor's estate, who at the time of assuming the trust is personally indebted to the estate, the guardian must pay the debt, separate the amount of it from his own funds, and invest it for the benefit of the ward, if he be solvent at the time, and his failure to so invest it is a conversion of that

amount of the ward's funds to his own use, and the bond is liable." See, also, *State v. Gregory*, 119 Ind. 503, 22 N. E. 1; *Sargent v. Wallis*, 67 Tex. 483, 3 S. W. 721; *Mattoon v. Cowing*, 13 Gray (Mass.), 387; *McGill v. O'Connell*, 33 N. J. Eq. 256; *Martin v. Davis*, 80 Wis. 376, 50 N. W. 171.

There was a breach of both bonds and the amount adjudged to be due the minors absorbs both bonds. Both having been breached during the currency of each, neither had a right to complain that both are made liable for the breach that occurred during the currency of each bond. Both are independently and separately liable in the full penalty, since the damage done to the wards exceeds the penalty of both. The burden that either bond is made to bear is neither lessened nor increased by the fact that the other is also liable for a different breach of faith in regard to the preservation of the same fund. Both bonds were given to make secure the funds, and, if it takes them both to do that for which they were given, neither has any ground of complaint. If no second bond had been given, the first would have been liable, because the actual conversion had taken place during its currency. If the money had simply been owing the guardian from a third person, and had been lost to the wards by the neglect of the guardian, the second bond would have been liable; and this is just what occurred, except that the debtor was the guardian himself.

But it is further argued that this suit cannot be maintained, because brought by Rowzee as "guardian *ad litem*," and not as next friend. In answer to this argument we have only to say that where a minor's interests are at stake, and when the record shows that a person instituting a suit is in reality acting as the "next friend" of the minor, this court will not look with critical eyes on the characterization which the next friend chooses to give himself in the pleadings. We shall treat him as

in truth what he is, the friend of the minor, and trust to the sound judgment of the infant's court to require of him the full discharge of his duty to the minor, by whatever name such person chooses to designate his representative character.

It follows that this case is affirmed on direct appeal, and reversed on cross-appeal, with direction to enter judgment here on cross-appeal against the sureties on the first bond for the full penalty of the bond.

So ordered.

Affirmed on direct appeal.

Reversed on cross-appeal.

Suggestion of error filed and overruled.

W. L. ROBINSON Co. v. R. L. WEATHERSBY.

[57 South. 983.]

1. LANDLORD AND TENANT. *Existence of relation. Bond for title. Rights of landlord. Lien on crops for rent. Equitable estoppel.*

Where the vendor of land executed a bond for title to the vendee, and put him in possession, the bond providing that the vendee should pay interest on the purchase money and that in case the purchase money was not paid promptly at maturity that the vendee should pay rent to an amount equal to the interest, on the vendee's failure to pay the purchase money, the vendor thereby became landlord and had a right to collect rent to an amount equal to the interest.

2. SAME.

In such case the vendor as landlord can enforce a lien for rent and supplies against a *bona fide* purchaser for value of the crops raised by the tenant on the land and a failure of the vendor to notify one extending credit to the tenant in reliance on his crops, did not estop the vendor from subjecting the crops to his lien as landlord, though the bond for title was not recorded.

3. SAME.

In such case the possession of the tenant under the bond was notice of its contents and there was no duty on the part of the vendor, landlord, to notify the creditor that he was extending credit at his own risk to the tenant.

APPEAL from the circuit court of Amite county.

HON. M. H. WILKINSON, Judge.

Suit by R. L. Weathersby and another against W. L. Robinson Company. From a judgment for plaintiff, defendant appeals.

On December 2, 1907, Weathersby Bros., who were the owners of land in Amite county, Mississippi, agreed to sell and executed bond for title to T. S. McGehee. The instrument recites that the obligors bind themselves for a consideration of two thousand, five hundred dollars, to be paid in five equal annual installments, beginning January 1, 1909, for which notes are given, to convey the land in question to McGehee, and further provides that the said notes shall bear interest at the rate of six per cent from January 1, 1908, "interest to be paid annually, said interest to be considered as rent, unless each note is paid as above specified." The instrument contains the further provision: "The consideration of this obligation is that if said T. S. McGehee shall pay said notes at maturity, and shall pay all taxes on said land and the interest thereon, as stipulated, the said Weathersby Bros. shall, on the completion of the payment of said notes, execute or cause to be made and delivered to said McGehee a sale of said land in a warranty deed in good and sufficient form, in the meantime they shall permit said T. S. McGehee to occupy and use for his own benefit said land, then this obligation to be in full force; otherwise to be null and void."

McGehee went into possession of the property, and lived on it during the years 1908 and 1909, and raised crops thereon. During these years he traded with Robinson & Co., who bought his crop in 1908, except certain

cotton delivered to Weathersby, which amount was credited on the bond for title, and which amount was not quite enough to equal six per cent. interest on the purchase price. In 1909, McGehee again traded with Robinson & Co., who bought his cotton, and at the end of 1909 surrendered the contract and moved from the place. Appellees thereupon demanded of Robinson & Co. the balance due for the year 1908 to bring the amount up to one hundred and fifty dollars, or six per cent interest on the purchase price, and the further sum of one hundred and fifty dollars for the year 1909. Upon the refusal of appellants to pay these amounts, appellees brought suit in the circuit court, setting up the fact that McGehee was their tenant for the years 1908 and 1909, and that they had a prior lien as landlord upon the agricultural products. Appellees contend that the relation of landlord and tenant did not exist under the contract.

On the trial, both sides asked a peremptory instruction. The court granted a peremptory instruction for appellees for the amount sued for, and this appeal is prosecuted.

Cassedy & Butler, for appellant, filed an elaborate brief too long for publication.

Price & Price, for appellee.

In our discussion we will not follow the elaborate brief of counsel for appellant, as we believe that it is based upon a total misconception of the case.

Did the relation of landlord and tenant exist between Weathersby and McGehee?

The bond for title contains the following language:

“With six per cent interest from January 1, 1908, the interest to be paid annually, said interest to be considered as rent, unless each note is paid as above specified.” And, “In the meantime they shall permit said T. S. Mc-

Gehee to occupy and to use for his own benefit said land.”

In 60 Miss. 362, this court said: “A bond for title is not a conveyance of the land, but a mere contract to convey upon a certain contingency usually the payment of the purchase money. The duty of the obligor and the right of the obligee are correlative, and the bond is the measure of both Mrs. Bacon, by the bond bound herself to convey the land to Safford, not absolutely and presently, but conditionally, when the purchase money should be paid. Until this was done she was the owner of the land, and as owner could lease it to another, or to the buyer, without in any degree violating his rights under the contract. Those who dealt with Safford were bound to notice the legal limits of his rights under the terms of the contract under which he held.”

The above is a case identical with the case at bar, except in that case possession was not given under the bond, but by a separate and in dependent rent contract, and the creditor was misled; whereas, in the case at bar, the rent contract and bond for title were included in one and the same instrument, and Robinson had knowledge of the instrument.

In *Bacon v. Howell*, *supra*, the court said: “For appellee it is urged that the deed of trust has precedence over the demand of the landlord, because Mrs. Bacon, by the execution and delivery of the bond for title to Safford, without reciting that rent was reserved in default of the payment of the purchase money, enabled him to procure credit upon the apparent ownership of the land.”

“If the legal effect of the execution and delivery of a bond for title is such as to warrant the world in dealing with the obligee therein in possession of the land as owner, the judgment must be affirmed; but it is the duty of one dealing with a person so circumstanced to inquire further of the character of his possession, the

judgment must be reversed. The possession of land by another than the true owner, when no other facts or circumstances are shown, is presumed by law to be held by the consent of, and under the owner and it is incumbent on one dealing with the tenant to inquire into the character of the right by which he holds, and the information to bind the owner, must be derived from him and not from the tenant."

The case above quoted from is a much stronger case against the plaintiff on the facts, than the case at bar, for there was a bond for title, saying nothing about possession, and an independent secret contract for rent; whereas, in this case, the whole contract was in one instrument and defendant testified that he had knowledge of the instrument.

If asked why the plaintiff did not go to defendant and give him notice that McGehee was his tenant, we answer first, that he had no knowledge that Robinson was supplying McGehee under a deed of trust on the crop, and that with knowledge he was under no legal duty to notify Robinson.

Second. Outside of the record, if asked privately, we would answer, that Weathersby was and is a helpless paralytic, caused by an almost fatal attack of typhoid fever, and cannot go to meals or to his bed or elsewhere without assistance.

Counsel cited *Maynard v. Cocke*, 71 Miss. 493, as a case directly in point and quotes it at length to sustain his view. We submit that it is not in point, because there was no bond for title, but an absolute conveyance, and if read in the light of this distinction is a complete answer to appellants' contention and a perfect accord with our view.

We admit that calling rent interest, or interest rent, does not make it the other any more than calling black white, makes it white.

Neither can you "eat your cake and have it."

Rozell could not give an absolute conveyance to land and still retain his legal status as landlord over it. The sole question as stated by Justice Woods was: "Can the dual relation of vendor and vendee, and landlord and tenant, subsist between the same parties when the vendee has received from the vendor an absolute conveyance to the lands sought to be charged with rent?"

Yet the court did go further and say, that such a relation coupled with the "calling of interest, rent" did give the vendor an equitable lien, even though there was not, unlike the case at bar, the relation of landlord and tenant.

The last word of this court on the principle in controversy will be found in *Flowers-Carruth Co. v. Moyse*, 95 Miss. 174. In this case Moyse gave Conerly a bond for title, which, like the instrument in the case at bar, stipulated for one hundred and fifty dollars per annum rent if default was made in payment of the purchase money notes. Here we again find attorney Butler eloquently urging the same proposition, citing the same cases, quoting the same passage, as in his brief herein; but strange to say Messrs. Cassedy & Cassedy were then earnestly and masterfully presenting our view. The court agreed with them, and speaking through Chief Justice Whitfield said: "The plaintiffs were manifestly entitled to recover."

The landlord's lien will prevail against a *bona fide* purchaser for value. *Newman v. Bank*, 66 Miss. 323. Neither ignorance as to the tenancy by a purchaser, nor false statement by the tenant as to his right to sell will defeat the landlord's claim. *Warren v. Jones*, 70 Miss. 202.

A landlord has a lien to secure his rent and supplies for the current year on all agricultural products raised upon the leased premises, and may assert it against the purchaser, with or without notice of such products. *Wm. Ball et al. v. Sledge*, 82 Miss. 749.

The question of estoppel does not arise in this case, and the question of waiver is not raised.

Weathersby testified, that the lint cotton paid by McGehee was paid as rent, in accordance with the contract, and was so understood at the time by both parties. McGehee nor anyone else was offered by appellant to contradict this evidence.

Thus we see that the relation of landlord and tenant did exist between Weathersby and McGehee, and therefore Ch. 76 of the Mississippi Code of 1906 is the law of the case. A law lien and not an equitable lien only available in defense as claimed by appellants. It follows that plaintiff is entitled to recover regardless of any question of notice to Robinson of the existence of the rent contract, or knowledge by Weathersby that Robinson was furnishing McGehee and that McGehee was selling his products to Robinson. If the rule seems harsh in its particular application to the special case, we must remember that ours is primarily an agricultural state. A vast majority of our citizens till the soil for their living, our whole commercial superstructure being built on agriculture as a foundation. The landlord has long been a favored class and will continue to be, for it is recognized that any other policy would be fatal to our institutions.

Jackson & Gordon, for appellee.

The contract to sell and the alternate rent agreement was entered into contemporaneously by the parties and it has been repeatedly held that there was nothing wrong in a contract so made. *Nobles v. McCarty*, 61 Miss. 456; *Bacon v. Howell*, 60 Miss. 362; *Maynard v. Cocke*, 71 Miss. 493 and *Flowers-Carruth Co. v. Moyse*, 95 Miss. 174.

It was not an absolute deed as in the case of *Maynard v. Cocke*, 71 Miss. 493, decided by this court, in which an identical agreement and clause was upheld. The contract here made, was one in which Weathersby Bros.

only obligated themselves to make a deed when the notes were paid by McGehee; and McGehee contracted to pay the notes or to pay rent and not paying the note for the year 1908, he paid thirteen hundred and sixty-five pounds of cotton on the alternate rent clause. And the contract should be construed according to the intention of the parties and that intention carried out. It would appear as to their intention by the payment of this rent. *Maynard v. Cocke*, 71 Miss. 493.

It was the duty of the Robinson Co. to inquire into the contract between Weathersby and McGehee, *Bacon v. Howell*, and failing to do so he dealt with McGehee at his own risk. He was put upon his inquiry by the answer of McGehee in the beginning when he said that he had bought the land from Weathersby Bros., and held their bond for title to same.

A contract of this character has been upheld by this court in every case of like nature coming before it, so far as we have been able to discover from the reports. *Bacon v. Howell*, 60 Miss. 362; *Nobles v. McCarty*, 61 Miss. 456; *Maynard v. Cocke*, 71 Miss. 493; *Bedford v. Gartrole*, 88 Miss. 429, and *Flowers-Carruth Co. v. Moyse*, 95 Miss. 174.

Argued orally by *J. T. Cassedy*, for appellant.

McLEAN, J., delivered the opinion of the court.

Appellant fails to discriminate between the well-marked and well-defined distinction of the relations existing between vendor and vendee, where an absolute conveyance is made, and where only a bond for title, an executory contract, an agreement to convey upon the payment of the purchase money, is entered into. In the former instance—that is, where the land is conveyed by deed—the vendee becomes the actual owner of the land; and, being the owner, he is entitled to the possession, and the vendor has no longer any title or estate

in the land. All that he has is merely a lien upon the land for the payment of the purchase price, and can subject the land to the payment; but in the case of an executory contract the vendor retains the title and the estate, and the vendor, having the title and the estate, also has the right to remain in possession. Being entitled to the use and occupation of the land, the vendor can himself occupy, or rent the land to whomsoever he pleases. This being the status of the parties, it must follow, under the terms of the contract in the instant case, that the vendor also became landlord. There is nothing inconsistent, much less unlawful, in the contract as to paying the purchase price and also the rent. Of course, calling interest rent does not make it rent; but the word "interest" here is used so as to make the amount of the rent definite and certain. Suppose, instead of saying, "Said interest to be considered as rent unless each note is paid as above specified," it had read, "If the note is not paid the said McGehee is to pay one hundred and fifty dollars rent," would there be, in legal contemplation, any difference? These principles are set at rest in *Bacon v. Howell*, 60 Miss. 362; *Nobles v. McCarty*, 61 Miss. 456; *Maynard v. Cocke*, 71 Miss. 493, 15 South. 788; *Flowers-Carruth Company v. Moyse*, 95 Miss. 174, 48 South. 523.

The fact that the bond for title was not recorded makes no difference. Possession of land under an unrecorded contract, whether executed or executory, is equivalent, so far as notice to third persons is concerned, to the recording of the instrument; but the possession is notice of just exactly what the rights and obligations of the parties are as shown by the instrument—no more, no less. It therefore follows that the Robinson Company had notice of the terms of the contract between the vendor and vendee, and therefore extended the credit to McGehee, with the notice that the plaintiff had a lien on the products grown upon the land for the payment

of the one hundred and fifty dollars, each, for the years 1908 and 1909.

In addition to this, the law is too well-settled in this state to require the citation of authorities that the landlord can enforce his lien for rent and supplies against a *bona fide* purchaser for value of the agricultural produce without notice of the landlord's claim.

The lower court ruled correctly in sustaining the objection of the plaintiff, to the effect that the plaintiff knew that the defendant was furnishing supplies to the tenant, for two reasons: First, as hereinbefore stated, the defendant was charged with the notice of the actual relations existing between the plaintiff and the tenant McGehee; but, in addition to that, there was surely no duty upon the part of the plaintiff to notify the defendant that the defendant was crediting McGehee at his (the defendant's) own risk. The proposed evidence did not show that plaintiff intended, or that his conduct was reasonably calculated, to mislead defendant, or that defendant was misled by the action of plaintiff.

We see no error in the record, and the case is affirmed.

Affirmed.

N. W. WHITFIELD v. FRANK MILES ET AL.

[58 South. 8.]

- 1 WILLS. *Executors. Undetermined share. Power of court. Remainders. Limitations. Computation of period. Accrual of right. Vesting of estate. Life estate. Tax sales. Wife of tenant. Right to purchase.*

Where a testator by will devised certain lands to his daughter and certain other lands to a son and provided that the lands devised to both should "be valued by three disinterested persons" to be appointed by the judge of the probate court and that if it was found that the lands devised to the daughter were materially less than the lands devised to the son, then he also devised to her a sufficient quantity of other lands, not otherwise devised as will make their lands of equal value and that such other lands should be selected for his daughter by his executors. And where after the probate of such will the court appointed commissioners and empowered them not only to value but also to divide the estate which they accordingly did and reported their action to the court which was confirmed, without objection by the executors, in such case the executors will be conclusively presumed to have adopted the acts of the commissioners as their own.

2. SAME.

In such case when the will was probated the daughter became not only entitled to the lands specifically devised to her but she also became entitled, as a matter of right, to such additional quantity of land as would make the lands specifically given to her equal in value to that of her brother, and there was no discretion left in the executors as to whether or not they would allow her this land.

3. SAME.

Under the terms of this will, there was not only a life estate created in an undivided interest in this land in the daughter until the selection was made, but there was also a vested right in the remainderman, which the trustees could not defeat and which her surviving brother could not convey beyond a life interest in the same.

4. REMAINDER. Limitations. Computation of period. Accrual of right.

Where land was devised to the testator's children for life, with the remainder of each in the other children for their life, and the remainder in fee to the surviving children of such children, a suit by the children of one of them to assert their right in the portion of a daughter who died childless in 1877, being predeceased by one of her brothers without issue, was not barred by the statute of limitations, where the only other child of the testator and the father of plaintiff died only a short time before the bringing of the suit.

5. LIFE ESTATES. Tax sale. Right to purchase. Wife of tenant.

A husband cannot assert a tax title against his remainderman or tenant in common, and the same disability attaches to his wife and her purchase of a tax title in such case operates as a redemption of the land for the interest of the life tenant and remainderman.

APPEAL from the Chancery Court of Clay County.

HON. J. Q. ROBINE, Chancellor.

Suit by W. W. Whitfield et al. against Frank Miles.

From a judgment for defendant, plaintiff appeals.

The facts are stated in the opinion of the court.

Wm. Baldwin and *J. J. McClellan*, for appellants.

A. F. Fox, for appellees.

No brief of counsel on either side found in the record.

MAYES, C. J., delivered the opinion of the court.

This suit was instituted by appellants against appellees, seeking to recover a certain tract of land described in the declaration. It would be profitless to set out the pleadings, further than they appear in this opinion. Appellants are the children of one W. W. Whitfield, and assert their claim to the property in controversy by reason of the fact that it was owned by W. W. Whitfield for life, with remainder to them. The facts out of which this litigation arises, briefly summarized, are about as follows:

It appears that in the year 1854 there was living in Lowndes county one William Whitfield, who was at that

time possessed of large bodies of lands in Lowndes and adjoining counties in Mississippi. William Whitfield had three children, William W., John A., and Lucy Ann Whitfield. Some time during the year 1854 William Whitfield died, leaving a last will and testament. This will has been before this court for construction once before in the case of *Whitfield v. Thompson*, 85 Miss. 749, 38 South. 113; but the point involved in that litigation, in our judgment, was different from the question now before the court. There are some sixteen items of the will, many of which are unnecessary to set out in this opinion, because not involved in this litigation. The particular controversy arises out of a construction of section 7 of the will. In the latter part of 1854, and after the death of William Whitfield, his will was duly presented for probate and allowed on October 4, 1854. The will appointed as executors William W. and John A. Whitfield. They duly qualified, gave bond, and accepted the office. We quote section 7 of the will, in so far as its provisions are involved in this litigation. It is as follows:

“I give, devise and bequeath to my daughter Lucy Ann Whitfield, above mentioned, the following negro slaves [here the will specifies the slaves to be given to her, which we will not copy], and also the following real estate, situated in said county of Lowndes, to wit: The plantation and lands attached thereto on which I am now living, on the east side of Tom Bigbee river, and I hereby direct that the said plantation and lands, and the plantation and lands hereinafter specially devised to my son, John A. Whitfield, be valued by three disinterested person to be appointed and sworn by the judge of the probate court of said Lowndes county, and if the said plantation and lands attached herein specially devised to the said Lucy Ann Whitfield shall be materially less in value than the value of the lands hereinafter specially devised to the said John A. Whitfield, then I also devise

to her a sufficient quantity of any other of my lands (not herein specially devised to either of my sons) as will make her plantation and lands equal in value to those devised to my said son, John A., such lands to be so selected for her by my executors as not to separate portions of a tract, nor injure materially the value of any other lands adjoining."

All the lands specifically devised by William Whitfield to the above children conveyed only a life estate. Each devise specified that the property given by the will to each devisee was "for and during the term of his [or her] natural life, with remainder over, after his [or her] death, to be equally divided among them provided that either of said children shall arrive at the age of twenty-one years, or marry, and leave a child or children surviving them. But if neither of said children shall arrive at the age of twenty-one years, or marry and leave a child surviving them, then the said property, both real and personal, shall be divided between the surviving brothers [or surviving brother and sister, as the case may be] to be held by them respectively for and during the term of their natural life, with remainder over to their children respectively," and in the event of the death of one of the survivors, leaving no child, then the whole of the property specifically devised "is to go to the survivor for and during the term of his [or her] natural life with remainder over to his [or her] children," etc. Lucy Ann and John A. Whitfield both died without children. William Whitfield, the grandfather of complainants, and the maker of the will, did not include all of the land he owned in the specific devises, but there was left a large residue. This residue was disposed of by item 12 of the will, and in the case of *Whitfield v. Thompson*, 85 Miss. 749, 38 South. 113, this court held that the residue under the terms of the will, was given in fee to the children of William Whitfield; that is to say, the three devisees named in the will. Under sec-

tion 12 the executors were given a discretion to deal with the residue in a way that would have defeated the title in fee to the devisees; but the executors did not exercise that discretion, and in view of this fact, this court held in the above case that the fee went by the will to the devisees. After the death of Lucy Ann and John A. Whitfield, William W., the surviving brother, inherited or took possession of all the land, and in a joint deed executed by himself and wife, S. E. Whitfield, sold the land in controversy under a fee-simple conveyance. William W. Whitfield died in 1903, and this suit is brought by his children to recover the land; the contention being that William W. Whitfield had only a life interest.

The particular lands in controversy are a part of the residue of the lands not specially devised; but it is claimed that the land was wrested from that clause of the will which allowed them to go to the devisees in fee, because they were set aside to Lucy Ann, in order to equalize the value of her lands with those of John A. Whitfield, as was required by the will, thereby becoming her property for life only, the remainder belonging to the complainants as provided in the will. Of course, there is a dispute as to whether or not the lands were ever set aside in the manner required by the will, and that forms the basis of one of the contentions on the part of the appellees.

Immediately after the probate of the will, on October 4, 1854, the probate court of Lowndes county appointed three disinterested persons in the manner required by section 7 of the will, and the order recited that they were "to divide the estate, both real and personal, of William Whitfield, deceased, between the legatees named in the last will and testament of said deceased, according to the provisions of the will." On November 1 appraisers of the estate of William Whitfield were appointed, the appraisers being different persons from the "three disinterested persons" appointed

by direction of the will. At the December term, 1854, the appraisement of the estate of William Whitfield was returned and approved and entered of record. On December 6, 1854, the executors, William W. and John A. Whitfield, filed an inventory of the estate, and in connection with this inventory stated that the appraisers of the estate had improperly included therein some negroes which should not have been included; but the executors say "they are nevertheless willing and desirous, in order to a more equal distribution; that said negroes should be valued by the commissioners appointed to value and divide the property of the estate according to the will," etc. This report is signed by the executors, and is of importance only as showing the fact that the executors of the estate were well aware of the order of the court appointing "three disinterested persons" to divide the estate of William Whitfield according to the provisions of the will, and that current with the proceedings and orders making the appointments the executors were themselves filing their reports and referring to the action of the court.

At the April term of the court, 1855, the "disinterested persons" appointed to make the division of the estate, both real and personal, made their report, and in this report it is shown that they reported to the court that the difference in value between the property left to John A. and Lucy Ann Whitfield was seven thousand, five hundred and forty dollars; that is to say, the value of the property left to John A. Whitfield was seven thousand, five hundred and forty dollars above the value of the property left to Lucy Ann Whitfield, leaving a deficit to be set apart to Lucy Ann, as provided in the seventh section of the will, of this amount, in order to make her land equal in value to that of her brother. In this report the "disinterested persons" appointed, not only assessed the difference in value, but they set aside to Lucy Ann the property involved in this litiga-

tion as the property which should go to her in order to make her estate equal in value to that of John A. Whitfield. In other words, the commissioners appointed under section 7 for the purpose of valuing the property of John A. Whitfield, to see how much it exceeded in value that of Lucy Ann, were appointed, and sworn, as the will required, by the judge of the probate court, and by the court empowered to not only make the valuation, but to divide the estate. Section 10 of the will gave the court the power to do this in reference to the division and equalization of the property named in section 10. These commissioners, and not the executors, set aside the land in controversy as the property of Lucy Ann; and, without any objection on the part of the executors, as far as this record discloses, since the executors were under the duty to do this, and were acting as executors in this estate at the time, they are conclusively presumed to have acquiesced in the action of the commissioners, and to have adopted it as their selection. The argument is made that the selection of the land was confided by section 7 of the will to the discretion of the executors, and that the only provision made in the will for any action on the part of the commissioners was simply to value, and not select, and that therefore anything else done by them was void, and this land was never selected as required by the will, and therefore, under the decision of *Whitfield v. Thompson*, 85 Miss. 749, 38 South. 113, it went to the heirs in fee. We will notice this contention later.

It appears that John A. Whitfield was killed in the Civil War in 1863, and was unmarried and childless, and therefore, according to the provisions of the will, he having only the life estate, with the remainder to his sister and brother for their life, his estate was inherited by his brother and sister for life. It also appears that Lucy Ann died, unmarried and childless, in January, 1877, and that William W. Whitfield died in January, 1903, leav-

ing as his heirs the complainants. Shortly after his death this bill was filed. If the contention of appellants is correct, that William W. and S. E. Whitfield only had a life estate, no question as to any statute of limitations can arise. In this controversy there is involved a tax title, it being claimed that Mrs. S. E. Whitfield, the wife, purchased this land at tax sale some time during the year 1877, and has been continuously in possession since that time until now; and it is argued that, even if the title fails in other respects, it is nevertheless good under the tax title. We will discuss both of these contentions.

An examination of the case of *Whitfield v. Thompson*, 85 Miss. 749, 38 South. 113, shows that the particular section of the will under consideration was not involved in the former case. Item 7 of the will expressly provides that Lucy Ann Whitfield shall have the property specifically devised to her by item 7, and additionally a sufficient quantity of property out of the residue of the real estate as to make her plantation equal in value to that of John A. Whitfield. In other words, the will itself gives to her the specific lands described in the will, and further devised to her other lands, not before specially devised, if it should be necessary in order to make her lands equal in value that of John A. Whitfield. When this will was probated, Lucy Ann Whitfield became not only entitled to the lands specifically described in section 7, but she became entitled, as a matter of right, to such additional quantity of lands as would make the lands specifically given to her equal in value to that of her brother. By section 7 of the will there was no discretion left in the executors as to whether or not they would or would not allow her this land; but the will gave it to her, if there was a difference in value. The commissioners appointed by the court, as required by the will, reported that there was a difference of over seven thousand dollars, and in this report specified the lands which they set aside to her as the lands to make up the

deficiency in value, and this was done without any objection on the part of the executors. Equity considers that as done which ought to be done, and, when the ascertainment of the difference in value was made by the commissioners, it was not within the power of the executors to defeat Lucy Ann in her right to have a part of the residue lands set aside to her; and, if the executors had refused to make the selection after this report, Lucy Ann could have appealed to a court of chancery and have compelled the selection. When the deficiency was reported to the court, Lucy Ann Whitfield became entitled to an undivided interest in this residue to such an extent as would make the value of her lands equal to that of John A. Whitfield. It then became a vested right in her, beyond the power of the executors to defeat, and every person purchasing this land was bound to take notice of all that affected the title under the will, as that was the source of title after it passed out of William Whitfield under his will.

Under the terms of this will, there was not only a life estate created in an undivided interest in this land in Lucy Ann until the selection was made, but there was also a vested right in the remainderman which the trustees could not defeat. W. W. Whitfield had no right to make any conveyance of this land, other than a life interest in same. The principle which we declare in this case is distinctly recognized in the case of *Whitfield v. Thompson*, 85 Miss. 749, 38 South. 113. The intent of this will is easily gathered. It shows a manifest purpose on the part of the testator to take from the residue a sufficient quantity of land to make the estate of Lucy Ann equal to that of John A. In the above case this court said that "the failure of the executors to act would not be allowed to defeat the ascertained intention of the will, it is true; but that failure cannot have operation to eliminate wholly from the will one of its clauses, and thereby to impart to the will a different meaning from

what it would have if they had acted. The intention of the testator and the meaning of his will are determinable from the will itself, and not from the subsequent conduct of the executors." And when we examine this will it is manifest that the testator did not intend to leave any discretion in the executors as to whether or not they should give to his daughter, Lucy Ann, enough land to make up the deficiency in value between the estate left her and John A. Whitfield. It was not necessary for the executors to make any conveyance to her from the residue of the estate. The will clearly impressed this residue with the rights of Lucy Ann as to this deficiency. Her interest and her title in the residue of the property was derived, not by the act of the executors, but by the will itself.

But it is argued that the complainants are barred by reason of the fact that the land was sold in 1877 for taxes and purchased by S. E. Whitfield. But W. W. Whitfield could not buy an outstanding title and set it up against the remaindermen, and neither could his wife. The purchase by them, or either of them, of this tax title, operated as a redemption of the land for the interest of life tenant and remainderman. Under the facts of this case, this court has repeatedly held that the disability which attaches to the husband also attaches to the wife, and where one cannot buy up an outstanding title and assert it against his tenant in common or remainderman, the other is also prevented from doing so. *Robinson v. Lewis*, 68 Miss. 69, 8 South. 258, 10 L. R. A. 101, 24 Am. St. Rep. 254; *Wade v. Barlow*, 54 South. 662; *Hamblet v. Harrison*, 80 Miss. 118, 31 South. 580; *Fox v. Kuhn*, 64 Miss. 465, 1 South. 629; *Clark v. Rainey*, 72 Miss. 151, 16 South. 499.

The question of improvements cannot be considered in this appeal.

Reversed and remanded.

WOODSON ATKINSON EX PARTE.

[58 South. 215.]

1. **BAIL.** *Pending appeal. Sufficiency of affidavits. Jurisdiction of supreme court. Health of accused. Merits. Certificates of physician. Constitution, Sec. 146, Code 1906, Sec. 67.*

Certificates of physicians not verified by affidavit, will not be considered by the court on an application for bail after conviction of a felony, pending an appeal to the supreme court.

2. **BAIL.** *Pending appeal. Jurisdiction of supreme court. Code 1906, Sec. 67. Constitution 1890, Sec. 146.*

Under the Constitution of 1890, Sec. 146, providing that the supreme court shall have such jurisdiction, as properly belongs to an appellate court, and Code of 1906, Sec. 67, giving said court or a judge thereof power to grant bail after conviction of a felony, pending appeal, such power is revisory only and should not be exercised until the petition for bail has first been acted on by the lower court.

3. **BAIL.** *Pending of appeal. Health of Accused. Code 1906, Sec. 67.*

Under Code of 1906, Sec. 67, providing for the admission of a person convicted of a felony to bail, pending an appeal, such person should be allowed bail, where six physicians make affidavit that confinement will aggravate an illness of the accused and imperil his life and health although two other physicians make affidavit to the contrary and one other partially dispute them.

4. **BAIL.** *Consideration in supreme court. Merits.*

In an application for bail, pending an appeal, by a party convicted of a felony, the supreme court will not allow to be introduced as evidence or give any consideration to alleged errors occurring in the trial in the lower court.

APPEAL from the circuit court of Pike county.

HON. D. M. MILLER, Judge.

Woodson Atkinson was convicted of embezzlement and, pending appeals, applied for bail.

The facts are fully stated in the opinion of the court.

R. N. Miller, for relator.

No brief found in the record.

MAYES, C. J., delivered the opinion of the court.

This case is before the court on the petition of Woodson Atkinson for bail. The petition substantially recites that Atkinson was convicted of embezzlement at the March term, 1912, of the circuit court of Pike county, and that he has appealed from this conviction to the supreme court, and the appeal is now pending. The petition then alleges that Atkinson is sick and in very bad health, and on this account seeks to be admitted to bail, pending the appeal, in such reasonable sum as this court may determine to be just. The petition further alleges that confinement in the jail imperils both the health and life of petitioner. The petition is filed under Sec. 67 of the Code of 1906, which we shall quote later; and, before presenting this petition to this court, a petition of the same nature was presented to the judge of the district in which the conviction took place, and before whom the trial was had, and the trial judge declined to grant bail, on the ground that the showing made was insufficient. After the circuit judge declined to grant bail under the first petition, a *de novo* application is made to this court. One of the contentions made by the state's attorneys in opposition to this petition is that the action of the trial court is conclusive, and that this court has only the power to review the action of the trial judge as an appellate tribunal. In other words, the state contends that section 67 of the Code confers upon "the court in which the conviction was had, or the supreme court, or the judge who presided at the conviction, or the judge of the district in which such conviction was had, or a judge of the supreme court in vacation," the right to release a person convicted of felony from imprisonment, pending an appeal to the supreme court; and if the person convicted makes application to any one of the courts

or judges authorized by the statute to release, and the application is denied, then it is contended by the state that neither this court, nor a judge thereof, can act, except as an appellate tribunal. We shall notice this contention further on in this opinion.

The petition filed with this court is accompanied by the sworn statement of Drs. W. M. Wroten, W. S. Lamp-ton, G. W. Robertson, J. M. Smith, J. T. Boyd, and W. W. Smithson. In a sworn affidavit, these physicians state that they met at the courthouse in Pike county on the 30th day of March, 1912, and carefully and fully examined the petitioner. They then set forth the history of his case and his physical condition, and state that, in their opinion, "an operation will be necessary for drainage of the gall bladder, in order for him to completely recover." They further state that, in their opinion, "confinement in the county jail will aggravate his trouble and imperil his health and life, and, in order for this operation to be performed, he ought to have exercise, proper diet and hygienic surroundings." Accompanying this petition are also the unsworn certificates of Dr. J. R. Sample, Dr. Otto Laub, and Dr. J. M. Curtis. The state objected to the introduction of these last certificates because not under oath, and we think the state's objection is well taken, and the court excludes them from its consideration. The above comprehends all the testimony introduced in behalf of petitioner.

The state introduced the affidavit of Dr. D. W. Jones. Dr. Jones states that, at the request of the district attorney, he went to Magnolia on the 5th day of April and made a thorough and exhaustive examination into the physical condition of Mr. Atkinson. Dr. Jones describes Atkinson's condition and gives a history of his symptoms, and concludes his affidavit by stating that it is his opinion "that Atkinson is a normal man, and is not suffering from any disease; that his life would not be endangered, nor would his health be seriously impaired

any more than any other normal man, by confinement in jail." The affidavit of Dr. Julius Crisler is offered by the state, and Dr. Crisler describes Mr. Atkinson's condition and symptoms, and concludes his affidavit with the statement: "I am very sorry to report that, while I believe confinement is not conducive to Mr. Atkinson's health, I am of the opinion that it will not jeopardize or imperil his life, according to the present findings." Dr. Crisler makes no reference to whether or not it is his opinion that confinement in the jail would seriously impair and undermine the health of petitioner, but merely states that confinement would not jeopardize or imperil the life of Atkinson.

Dr. McLeod, for the state, makes an affidavit that on the 5th day of April, at the request of the district attorney, he made a close and personal examination into the physical condition of Mr. Atkinson, and, after giving a history of the result of his examination and describing his physical condition concludes as follows: "Affiant says that, in his honest and candid opinion, the life of the said Woodson Atkinson is not endangered by confinement in jail; nor does he consider that remaining in jail will be a serious detriment to his health any more than that of any other normal man."

The above is the testimony presented to this court for its guidance in determining whether or not bail, pending appeal, should be granted. The learned physicians are in hopeless conflict as to the physical condition of Mr. Atkinson and the peril to his life and health. Six of the physicians give it as their opinion that confinement will aggravate Atkinson's ailment and imperil his life and health; two state that neither his health nor life will be endangered; and the third certifies that, while he believes confinement will not be conducive to Mr. Atkinson's health, it will not "jeopardize or imperil his life."

But, before deciding this case on the facts, we will discuss the power of this court to act on this petition *de*

There must be strong grounds for apprehending a fatal result or permanent impairment of health.” Surely the measure of proof required by this rule of law is met when six skilled and reputable physicians, under their oaths, state that the confinement of Atkinson imperils his life and health. It is true that it may be said that three make a contrary statement. Which of these physicians are correct we cannot tell; but certain it is that all are equally worthy of belief, and the greater weight of testimony is necessarily with petitioner.

In the case of *Ex parte Wheeler*, 24 South. 261, this court reannounced the law as declared in the *Pattison* case, in 56 Miss. 161. While it is true that court and judges should exercise the power to grant bail after conviction of felony “with the greatest caution, and only when the peculiar circumstances of the case render it proper,” yet the very object of conferring this power on the courts and judges is for the purpose of having a humane execution of the laws, and to prevent cruelties and hardships. When the facts of any case make a proper case for the enforcement of this statute, judges and courts should not hesitate to give a prisoner the benefit of a law that was enacted for the purpose of preventing cruelty under any form of the law.

Counsel representing petitioner present what purports to be a part of the record in the trial of the case in the court below, and argue here that this court should consider the probability of the reversal of this case, when it reaches here on the merits, in determining whether or not this petition will be granted. Counsel argue that a mere glance at the part of the record in the court below which they attempt to use in this court will demonstrate that this case must be reversed, when it reaches here on appeal. In answer to this argument, we say that on a hearing of this kind this court will not allow to be introduced as evidence, or give any consideration to, the alleged errors occurring on the trial. The record is not

before us, and cannot get before us, except on appeal. This petition has nothing to do with errors in the record. The trial in the court below, on this character of proceeding, will be conclusively presumed to have been regular and free from error until the cause comes by appeal to this court.

Let petitioner be admitted to bail in the sum of ten thousand dollars, bond to be filed with and approved by the circuit clerk of Pike county. Let the clerk of this court enter the order of this court on the minutes of the court here, and send a certified copy of the same to the clerk of the circuit court of Pike county, with direction that the certified copy shall be entered on the minutes of the circuit court of Pike county.

So ordered.

Petition granted.

W. R. HENRY ET AL. v. T. R. HENDERSON, EXR.

[58 South. 354.]

1. **WILLS.** *Construction. Perpetuities. Suspension of alienation. Donee. Lives in being. Trustees. Cross remainders. Code 1906, Sec. 2765.*

In the construction of wills it is the duty of courts to ascertain the intention of the testator and to enforce such intention provided it is lawful.

2. **SAME.**

Where a will is susceptible of two reasonable constructions, one valid and the other invalid, the former construction must prevail.

3. **PERPETUITIES.** *Suspension of alienation. Equitable estate. Donee.*

The devise of an equitable estate makes the beneficiary a "donee" under the statute against perpetuities.

4. PERPETUITIES. *Lives in being. Trustees. Code 1906, Sec. 2765.*

The life of a trustee under a will will not be taken into consideration in determining whether a devise is void, as within the statute against perpetuities, Code 1906, Sec. 2765, as equity will not allow a trust to fail for want of a trustee; and when a will gave property to a trustee the proceeds of which were to go to the husband of the testatrix for life, the husband was the first taker under the statute.

5. WILLS. *Construction as a whole.*

In construing a will, the whole text must be taken into consideration in order to ascertain the meaning of the testatrix so that, where it is apparent that it was the intention of a testatrix to give her nephews a tenancy in common in lands to go to the heirs of "their bodies at their death" and the next preceding section clearly expresses an intention that the survivor shall take the whole of the proceeds of realty, the omission will be deemed to be intentional, and the provision will be construed to pass the fee to the heirs of either of the nephews at his death, rather than at the death of the survivor.

6. WILLS. *Construction. Cross remainders.*

A cross remainder can exist only in two ways: First, by express words; or second, by implication.

7. SAME.

A will should never be construed so as to create a cross remainder by implication, when in so doing the will is destroyed, because a cross remainder by implication arises only in order to prevent a chasm.

8. WILLS. *Construction in favor of the instrument. Lives in being. Perpetuities. Donee. Code 1906, Sec. 2765.*

The real meaning of Code of 1906, Sec. 2765, is that there shall be no fees tail, that is, you shall not tie up lands by binding it to the heirs of the body generally or specially but you may give it in succession to persons then living, not exceeding two and the heirs of the body of the survivor.

9. SAME.

Where a will devised the remainder of the real estate of the testatrix, to her two nephews, and at their death to go to the heirs "of their bodies," and that the income of said property should be applied to the payment of certain annuities and legacies, and further provided that the entire estate should be kept

intact during the life of the husband of testatrix, and the income should be devoted to his support; in such case as a construction of the will which would pass to a surviving nephew the estate granted the other, would create a succession of three lives before the vesting of the fee, the husband being a "donee" within the statute against perpetuities, the fee will be held to pass to the heirs of a nephew upon his death, rather than upon the death of the surviving nephew.

APPEAL from the chancery court of Leflore county.

HON. M. E. DENTON, Chancellor.

Suit by T. R. Henderson, executor, and others against W. R. Henry and others to construe a will. From a judgment construing the will, defendants appeal.

The facts are fully stated in the opinion of the court.

Green & Green, F. A. Montgomery, Watson & Perkins, Clarkson & Duls, for appellants.

Gardner & Whittington, Pollard & Hammer, Mayes & Longstreet, for appellees.

No brief of counsel for either side found in the record.

McLEAN, J., delivered the opinion of the court.

Mrs. L. H. Henry, a resident and citizen of Leflore county, in this state, departed this life in January, 1898. She died without leaving any child or descendants of such child. Her husband, Dr. J. P. Henry, survived her and died in May, 1898. She had at the date of her death two grandnephews, Joseph Ditto Craig and Loraine Craig. Joseph Ditto Craig died January 4, 1901, unmarried and without issue. At the date of the death of the testatrix, Joseph Ditto Craig was twelve years old, and Loraine Craig nine years old. At the date of the death of Joseph Ditto Craig he left as his only heirs his brothers, Loraine Craig and one Raymond Craig. Loraine Craig became of age on the 26th day of November, 1909, and this petition was filed by the executor of the last will and testament of Mrs. Henry for the pur-

pose of having Mrs. Henry's will construed, so that he might be advised as to what settlement to make with the beneficiaries under the will.

On the 1st day of July, 1897, Mrs. L. H. Henry published and declared her last will and testament; on the 4th day of January, 1898, she also declared and published a codicil; and again, on the 20th day of January, 1898, she prepared and published a second codicil to said will. The testatrix made several bequests to various parties, and the only portions of her will and codicils which are necessary to be considered are the following provisions:

“(a) It is my will that the proceeds of the sale of said real estate in the town of Greenwood shall be loaned out or invested as the said executor shall think best, and the income alone to be given to Joseph Ditto Craig and his brother Loraine Craig until they both become of age, and on the maturity of the said Loraine Craig the corpus of the proceeds of the sale of said real estate shall be equally divided between both of said brothers; should either die before maturity, then the survivor to inherit the whole on coming of age.

“(b) The remainder of all of my real estate I give and bequeath to Joseph Ditto Craig and his brother Loraine Craig for and during their natural lives, and at their death to go to the heirs of their bodies, with this proviso: That the income from said property first be applied to the payment of the legacies hereinafter named, and after said legacies are paid then said income shall also be charged with the payment of the annuities also hereinafter named, and after payment annually of said annuities, then the remainder of said income shall be paid to said brothers by said executor.

“(c) It is my further will that my said executor shall take and keep exclusive charge of all of said real estate not disposed of as aforesaid, or to be disposed of, until said Loraine Craig shall become of age, and on

the maturity of the said Loraine Craig, who is the younger of said two brothers, then said real estate not disposed of as herein provided shall be turned over to them, together with all personal property on said land for their natural lives as aforesaid, together with all moneys on hand belonging to them as hereinmentioned

“(d) It is my further will that my executor shall employ some competent man to manage and control said plantation until said Loraine Craig shall become of age, if in the opinion of said executor it shall be to the best interest of said estate to do so. Said executor to exercise his best judgment for the interest of said estate in the management of said property.

“(e) Should my husband outlive me, then it is my will that my property shall be kept intact during his natural life; that is, the income from the same for his support and maintenance.”

The above are the provisions of the will executed the 1st day of July, 1897. On the 1st day of January, 1898, she executed a codicil containing this provision:

“It is my further will that in the event of the failure of issue by the said Ditto and Loraine Craig, that on their death all property bequeathed to them shall go to the nephews and nieces of my husband, J. P. Henry.”

On the 20th day of January, 1898, a second codicil was made, wherein the following provisions were inserted:

“It is my further will that the bequest made by me to Mrs. D. W. Henry and her six children of certain lands in Leflore county, as shown by said codicil made January 14, 1898, shall not take effect until after the death of my husband and until after all legacies are paid; that is to say, the property bequeathed to her as aforesaid and her children shall be used, controlled and managed by my executor until after the death of my husband, and until after legacies are paid; and the income from said property shall be used exclusively for the benefit of my husband, and at his death said income shall be

used as aforesaid with my other property for the payment of legacies unpaid. After his death and after all legacies are paid, then they are to own said property as hereinbefore provided.

“It is my further will that my executor shall at my death take charge of all of my property as hereinbefore provided, and that he shall give to my husband my entire income from said property for and during his entire life, subject, however, to this provision, that is to say, that Mrs. D. W. Henry shall receive during the life of my said husband the sum of three hundred dollars per year, which sum shall be deducted from the income from said property.

“It is my further will that no annuity hereinbefore provided for shall be due and payable until after the death of my husband, and until after all legacies herein provided for are paid in full except that to Mrs. D. W. Henry.

“It is my request that my husband have paid during his life the legacies hereinbefore provided for from the income from said property, should there not be enough money on hand at my death, together with the proceeds of the sale of said personal property and over and above the necessary expenses of making and gathering said crop, with which to pay said legacies.”

The statutes of this state bearing upon the question presented by this record are Sec. 2436 of the Code of 1892, which is as follows:

“Estates in fee tail are prohibited; and every estate which, but for this statute, would become an estate in fee tail, shall be an estate in fee simple; but any person may make a conveyance or a devise of lands to a succession of donees then living not exceeding two, and to the heirs of the body of the remainderman, and, in default thereof, to the rights heirs of the donor, in fee simple.”

Section 2441: “All conveyances or devises of lands made to two or more persons, or to a husband and wife,

shall be construed to create estates in common, and not in joint tenancy or entirety, unless it manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint-tenancy, or entirety with the right of survivorship; but this provision shall not apply to mortgages or devises, or conveyances made in trust."

The only office that the court can perform is to ascertain the intention of the testatrix and then to enforce the intention, provided that intention is unlawful. It is the duty of the court to so construe the will, if possible, as to make the instrument valid. If the will is susceptible of two reasonable constructions, one valid and the other invalid, the former construction must prevail. Examining the will and codicils from their four corners, interpreting them from the point where the view is obtainable to all and each of their parts, the conclusion is irresistible and inescapable: First. That the testatrix intended that the income from the property in controversy should go to her husband during his life. This is the dominant and controlling purpose, clearly manifested, not only from the will, but also from the codicils. Whenever she undertakes to deal with this property, whether in the will or in the codicils, the language unmistakably manifests the purpose that her husband, if he survive her, shall have the income from this estate. Second. That after the death of her husband her two nephews, Joseph Ditto Craig and Loraine Craig, were to have this property for and during the term of their natural lives, and at their death to the heirs of their bodies. Third. The nephews and nieces of the testatrix's husband were to have no interest in this property, except upon the failure of issue upon the part of Joseph Ditto and Loraine Craig. These several purposes are so plain that no one can question them.

Under paragraph above marked (a) of the will, the proceeds of the sale of the real estate in Greenwood were to be loaned by the executor, and the income alone

to be given to Ditto and Loraine Craig until they both became of age, and upon maturity of Loraine (he being the younger) the corpus of the proceeds of the sale to be equally divided between said brothers; should either die before maturity, then the survivor to inherit the whole on coming of age. There is nothing obscure about this, and it is manifest that the testatrix intended that the survivor, when he reached majority, was to have all of the property mentioned in this item, absolutely.

The property enumerated in item (b) above named—that is, the remainder of the real estate—how and to whom does it go? That is the single question in this case. The statute is plain and unequivocal that an estate in common is created, unless it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy or entirety, with the right of survivorship. There is nothing in the language used by the testatrix from which it can be deduced that such was her purpose. The only expressions in the will in that direction are that: “at their death to go to the heirs of their bodies,” and “for and during their natural lives.” It was impossible for them to have heirs of their bodies—that is, of their joint bodies—as both were brothers. The expression “their bodies” must mean heirs of their respective bodies. The estate was devised to “their heirs,” respectively; i. e., the heirs of the body of Ditto to have his estate in fee simple, and the heirs of Loraine to take his estate in fee simple.

In *Hawkins v. Hawkins*, 72 Miss. 749, 18 South. 479, this court in the clearest terms construed a provision like the one under consideration to vest in the parties an estate in common. The conveyance under consideration in that case read as follows: “We give to them, our said nieces [naming them], said lot as described, with all appurtenances, etc., arising from the same during their natural lives, and at their death to the descendants of their bodies in fee.” This court, quoting Sec.

2441, Code 1892, says: "We concur also in the conclusion that it does not sufficiently appear by the deed that the grantor intended to preserve the right of survivorship, to withdraw the conveyance from the operation of the statute." But, in addition to this, it is manifest that the right of survivorship was not given, when reference is made to the provision in the will marked above item (a). There it is specifically stated that "the survivor of the two brothers was to inherit the whole." This indisputably shows that this identical proposition was then in the mind of the testatrix. Her mind then dwelt upon it, and by apt words she manifested her intention that the survivor should take the whole; and then, in and by the next sentence—we may say in the same breath—before the idea passed from her mind, she makes provision for "the remainder of all of her real estate," and fails, as if purposely, to manifest that the survivor should take the estate of his brother. The conclusion, therefore, is clear that the intention was that a different devolution was to apply as to the property enumerated in item (b) from that named in item (a).

If we correctly interpret *Hawkins v. Hawkins, supra*, it holds this, and nothing more: First, the life tenants took as tenants in common, and the estate of the life tenant did not pass to her survivor; second, that each life tenant took for the life of the longest liver—that upon the death of the life tenant dying first, her interest or estate did not pass to her survivor, but descended to her heirs at law, not in fee simple, but until the death of the life tenant dying last, when the ultimate fee passed under the conveyance. The two-donnee statute did not pass in review before the court. It was not involved in that controversy. The court simply construed that deed. It did not decide whether any of the limitations were too remote. Gray on Perpetuities, section 629, says: "The rule against perpetuities is not a rule of construction, but a peremptory command of law. It is not,

like a rule of construction, a test, more or less artificial, to determine intention. Its object is to defeat intention; therefore every provision in a will or settlement is to be construed as if the rule did not exist, and then to the provision so construed the rule is to be remorselessly applied." In this connection we desire to say that, though an ulterior limitation of the estate devised is void, the whole provision, on that account, will not be declared void; but, upon the other hand, that portion of the will will be sustained in so far as it does not offend against the principle of perpetuities.

The rule at common law required that the limitation should come to an end and the ultimate fee should vest within twenty-one years and ten months after the death of the last survivor of any number of successive donees or devisees, who were in being at the time the devise took effect. Under the statutes in force in this state prior to the Code of 1857, estates tail were converted into estates in fee simple, and it was permissible for a conveyance or devise of lands to be made to a succession of donees then living. The number was unlimited, the only restriction being "then living." The change made in the statute in 1857, which continues to this date, is "to a succession of donees then living, not exceeding two."

The statute (Code 1857) was designed to prohibit estates from being tied up for an indefinite period of time. It was to facilitate the alienation of land, to throw it back into the track and channel of commerce, and to prevent the building up of a landed aristocracy, as existed in England; in other words, the purpose of the legislature, as expressed in this statute, was to place a time limit as to when the ultimate fee was to vest, this limit to be measured, not by any certain number of years, but by a definite number of lives of donees then in being, not exceeding two. As the court held in *Banking Company v. Field*, 84 Miss. 662, 37 South. 145, referring

to *Cannon v. Barry*, 59 Miss. 289, and *Jordan v. Roach*, 32 Miss. 620: "That the lives of the two donees in being were the measure of time within which the ultimate fee must vest."

The question therefore arises: Did the devise to the succession of donees then living exceed two? In order to answer this, we must determine whether the husband, Dr. Henry, was a donee. It is manifest, from the reading of the will and the codicils, as hereinbefore stated, that the chief concern of the testatrix was to provide for her husband; in fact, he was to have the entire income, except the sum of three hundred dollars per year to be paid to Mrs. D. W. Henry.

The general and almost universal rule is that the devise of an equitable estate makes the party a donee. In other words, the donation need not be of the legal estate. There are authorities to the effect, which meet with our concurrence, that benefits can be conferred and bequests may be made, and that a mere usufructuary use can be given without conveying an estate. This is to be determined by the construction of each particular instrument. As tersely said: "No will has its brother." It would be doing violence to the language used by the testatrix in the instant case to conclude that it was not the purpose to make her husband a donee for life of the property. So long as he lived he was to remain the beneficiary.

True, the legal estate did not vest in Dr. Henry, but was conveyed to the trustee; but the life of the trustee cannot be taken into consideration, as equity never allows a trust to fail for want of a trustee. *Cady v. Lincoln*, 57 South. 213. Should the executor or trustee die, his place would be filled as often as it may be necessary for the execution of the trust. The persons to be numbered as donees are those who take the profits arising from the estate. We therefore must conclude that Dr. Henry, the husband of the testatrix, was a donee. He

was the first taker. After his death the property was to go to Ditto and Loraine Craig as tenants in common for their lives, and at their death to the heirs of their bodies. If the will and codicils be construed to mean that there was first carved out a life estate for Dr. Henry, and, second, a life estate for Ditto Craig, and that the estate of Ditto Craig was not to vest in fee simple until after the death of his brother, Loraine Craig, there would be a suspension of the vesting of the ultimate fee for the lives of three persons (all of whom are successive donees) then in being at the date when the will took effect. This is in contravention of the express terms of the statute. If, upon the death of Ditto, he had left heirs of his body (children), and if Ditto's interest in this land had devolved upon or passed to Loraine for his (Loraine's) life, the curious result would be that, if Loraine outlived the children of Ditto, then the children of Ditto would not enjoy this estate. They would simply be the medium through whom the estate would pass. We cannot be persuaded that such was the intent of the testatrix.

It is ably presented that the expressions "at their death to go to the heirs of their bodies" and "for and during their natural lives" mean that the vesting of the ultimate fee does not happen until the death of both the life tenants, Ditto and Loraine; that each of the life tenants take, not only for his own life, but also for the life of the survivor; and that upon the death of either a cross-remainder by implication arises in favor of the survivor. This argument as to a cross-remainder is made in order that the estate may reside in some one, until the remainderman can be let in to enjoy the estate, and this cross-remainder must exist in order to prevent a chasm.

We do not consider the words "their death" to mean the death of both. It frequently occurs that "their" means "his" or "her," and vice versa. The whole text

of the instrument must be taken into consideration, in order to ascertain the meaning of its maker. When we construe, as we do, that the will made the two, Ditto and Loraine, tenants in common, there should be something more in the will than a mere implication that "at their death," means at the death of the survivor; and when we look back at the clause marked (a) in this opinion, wherein it is provided that the survivor takes the whole as to the proceeds of the sale of the realty, it must be presumed that an equally clear intention would be manifested if the testatrix intended that if, upon the death of either, the survivor was to hold the estate of his deceased brother until his (the survivor's) death. No such intention is justified from the language used.

A case almost identical with the instant case is the well-considered one of *Gindrat et al. v. Western Railway of Alabama*, 96 Ala. 162, 11 South. 372, 19 L. R. A. 839. The deed in that case conveys the property to a trustee, and provides as follows: "For the sole and separate use, benefit, and behoof of Sara E. Gindrat during the term of her natural life, and at her death said premises shall still be held in trust for her three children, to wit, Abraham Gindrat, Mary Elizabeth Winter, and William B. Gindrat, for and during the term of their natural lives, and at their death the same shall vest in the heirs at law, or children of them, the said Abraham, Mary Elizabeth, and William B., that may be living at the time of their deaths." In construing this deed the court says: "It is entirely safe to say, however, that Abraham Gindrat, William B. Gindrat, and Mary Elizabeth Winter took vested remainders for life, subject to divesture by the execution of the power of sale by the trustee." And, further: "It may not be very clear upon the face of the paper, looking alone to the words of limitation over, whether the purpose was to have the remainder take effect in possession only after the deaths of all the second life tenants, or to have the children of each take

a vested estate in possession in a one-third undivided interest upon the death of their ancestor. It would seem, however, to follow, from the several character of the precedent life tenants, that the latter is the more reasonable, if not necessary, conclusion; and it is reinforced by the consideration that the manifest purpose of the deed was to provide for the support of Mrs. Sara E. Gindrat, then of three of her children for life, and finally of her grandchildren—a purpose which could best be subserved, if, indeed, it could be subserved at all otherwise, by vesting the estate in the grandchildren immediately upon the death of their respective parents, who, it is to be supposed, would be theretofore supported by the ancestor out of the usufruct of one-third of the property for life. It may readily be conceived that the children of Abraham, for instance, who died in 1884, would not enjoy the benefits intended to be conferred upon them by the conveyance; that the intention of the grantor as to them would not be effectuated, if it should be held that they are denied all participation in the property from the death of their father until the death of Mrs. Winter, who still survives; and we therefore feel that we are conserving the real intent and purpose of the grantor, as well as effectuating the necessary results of the several character of the ownership of the second life tenants, in holding that, upon the death of each one of the life tenants, their children, respectively, became entitled to the absolute fee, and with the fee, of course, the possession of a one-third undivided interest in the property.” This reasoning meets with our concurrence. We cannot believe, from the language used by the testatrix, that her purpose was to postpone the enjoyment by the heirs of the body of either Ditto or Loraine until the termination of the lives of both Ditto and Loraine, but rather, upon the death of either, the heirs of him so dying were to be let in to the enjoyment of their deceased ancestor’s estate.

As to the argument of appellees relative to the cross-remainder: A cross-remainder can exist only in two ways: First, by express words; or, second, by implication. A will should never be construed so as to create a cross-remainder by implication, when in so doing the will is destroyed; because a cross-remainder by implication arises only in order to prevent a chasm. In other words, a cross-remainder by mere implication will never arise, when in so doing the will of the testator is thereby destroyed or rendered invalid, and intestacy thereby created. If, upon the death of Ditto, a cross-remainder is implied, so that Ditto's life estate passed to, or is held by, Loraine until his (Loraine's) death, as is argued by appellee, then there would be held in suspension, before the ultimate fee could vest, three estates: First, Dr. Henry's life estate; second, Ditto's life estate; and, third, the estate carved out of Ditto's life estate after his death for the benefit of Loraine, all of whom were living at the date of the execution of the will and at the date when it took effect. So that we have a succession of donees then living, exceeding two. This would offend against the two-donee statute, thereby creating intestacy after the two life estates are carried out; and hence it must follow that there is by implication no cross-remainder. If, upon the other hand, Ditto and Loraine took for the life of the longest liver, then this result would follow: Dr. Henry, for his life, first donee; Ditto, for his life, second donee; third, remainder of Ditto's estate to his heirs, his brothers, Loraine and Raymond, who take for the remainder of Loraine's life, third donees; and then, upon the death of Loraine, the ultimate fee as to the property given to Ditto would vest in the nephews and nieces of Dr. Henry under the codicil, Ditto having no issue of his body. This would create three successive donees before the ultimate fee would vest. This is in the teeth of the statute.

This court, in *Banking Co. v. Field*, 84 Miss. 668, 37 South. 145, upon the authority of *Cannon v. Barry*, 59

Miss. 289, decided in 1881, before this will was executed, said: "The statute in its real meaning says, 'There shall be no fees tail; i. e., you shall not tie up land by limiting it to the heirs of the body generally or specially, but you may give it in succession to persons then living, not exceeding two, and the heirs of the body of the survivor.' " But if, upon the other hand, the will and the codicils are construed to mean that Ditto and Loraine took in severalty as tenants in common, and that upon the death of either his estate terminates and passes to the heirs of his body, or, if (under the codicils) upon failure of issue the ultimate fee vests in the nephews and nieces of Dr. Henry, we maintain the instrument, and by so doing place upon the will and codicils what seems to be the more reasonable construction.

We therefore uphold the will and codicils, and the result is that upon the death of Ditto, he dying without issue, his undivided one-half interest in this property vested in the nephews and nieces of Dr. Henry.

Reversed.

ADDENDA OPINION.

As the writer of this opinion expects to retire from the bench within a few days, and as a suggestion of error will perhaps be made, in the consideration of which he will not participate, he deems it proper to make this addenda to the former opinion, in order, if possible, to be more explicit. While the original opinion expressed the viws of each and every member of the court, after a full consideration and conference, this addenda is solely the individual views of the writer.

In the original opinion handed down in this case we held, under the will of Mrs. Henry:

First. That Ditto and Loraine Craig took each an undivided one-half interest in the lands for life, and that upon the death of Joseph Ditto Craig his undivided one-half interest would have vested in fee simple in the heirs

of his body; second, that, since he died without issue, the ultimate fee in his undivided one-half interest in this property went, under the codicil, to the nephews and nieces of Dr. Henry. We did not consider it necessary to enter into any discussion as to the reason why the nephews and nieces of Dr. Henry became invested with the ultimate fee; but it is manifest from the opinion that we did so upon the predicate that they, the nephews and nieces, were the right heirs of the donor, as shown from the record in this case. It is true that if Dr. Henry, the husband of the testatrix, had married after the death of the testatrix and had left children, those children would have been the right heirs of the donor. We construe the word "heirs" to mean such persons as would inherit under our statute. It is to be observed that the instrument provides "in the event of failure of issue on their death." If the words "on their death" had been omitted, the statute (Sec. 2778, Code 1906; Sec. 2448, Code 1892) would have written those words into the instrument. Under said section the words "heirs of the body," or "issue of the body," etc., is held and interpreted as a limitation to take effect when such person shall die, not having such "heir or issue" living at the time of his death. *Banking Co. v. Field*, 84 Miss. 646, 37 South. 145.

Second. That under Sec. 2436 of the Code of 1892 (Sec. 2765 of the Code of 1906), wherein the statute says, "In default thereof (that is, in default of the heirs of the remainderman), to the right heirs of the donor in fee simple," it is not necessary that the limitation to the right heirs of the donor must be to them generally; but, upon the other hand, it may be to one or more of them specifically. In *Banking Co. v. Field*, *supra*, it is there specifically said: "In answer to the first proposition, it is to be said" (which first proposition is the one now under consideration) "that in *Busby v. Rhodes*, 58 Miss. 240, *Cannon v. Barry*, 59 Miss. 299, and *Halsey v.*

Gee, 79 Miss. 193; 30 South. 604, this court has expressly held that a limitation over to a specific person, being one of the right heirs of the donor, is valid."

Third. As to the proposition that the words "to the right heirs of the donor in fee simple" mean that the estate is to go to the heirs of the donor by descent and not by purchase. In this case the court also said: "The conclusive reply is that in *Busby v. Rhodes*, 58 Miss. 240, *Halsey, v. Gee*, 79 Miss. 193, 30 South. 604, and *Cannon v. Barry*, 59 Miss. 299, this court has expressly held that the right heirs of the donor took by purchase, and not by descent—as limitees under the terms of the will or deed, and not as heirs."

ST. LOUIS & SAN FRANCISCO RAILROAD CO. v. MRS. IDA
MOORE ET AL.

[58 South. 471.]

1. APPEAL AND ERROR. *Harmless error. Instructions. Conflicting evidence. Verdict. Railroads. Operation. Injuries to persons on track. Rate of speed. Definition of terms. Death. Elements of compensation. Code 1906, Sec. 721.*

Where instructions were too liberal for defendant, he cannot complain.

2. FINDING OF FACTS. *Conflicting evidence. Verdict of jury.*

Where the evidence is conflicting and the issue was fairly submitted to the jury under proper instructions, their finding is conclusive on appeal.

3. RAILROADS. *Operation. Injuries to persons on track. Rate of speed.*

It is negligence in a railroad company to run its trains in the nighttime at such a speed that it is impossible, by the use of ordinary means and appliances, to stop the train within the distance in which obstructions upon the track can be seen by the

aid of the headlight of the engine, and if anything in surrounding conditions and circumstances suggest an increase of care in the operation of a railroad train to avoid peril and damage, the duty to increase such care proportionately increases, and this rule applies to the country and sparsely settled sections as well as to cities where there is a speed limit by law.

4. SAME.

To run a railroad train at night propelled by the powerful agency of steam or electricity through an incorporated city or town and in violation of the statute at such a rate of speed as to make it impossible, by the exercise of ordinary care, to stop the train within the distance shown by the glare of the headlight of the engine, is such reckless conduct amounting to wilfulness as will justify the imposition of punitive damages in favor of one struck on its tracks and injured thereby.

5. RAILROADS. *Instructions. Harmless error.*

In an action for damages for the death of a party struck by a train, an instruction that the jury might consider the pain and suffering of the deceased as "shown by the record" up to the time of his death, and there was no evidence from which the jury could infer that such death was other than instantaneous, the giving of such instruction was harmless, where from the entire record and the amount of the verdict it can be seen to have had no prejudicial effect.

6. INSTRUCTIONS. *Punitive damages. Definition.*

It is not necessary that the jury should be instructed as to what constitutes punitive damages; it is presumed that the jury understands what is meant by punitive damages as much as they understand what is meant by actual or compensatory damages.

7. SAME.

An instruction to the jury as to their right to inflict punitive damages is not improper for failure to define what "punitive" damages are, in the absence of a request for such a definition.

8. DEATH. *Actions for causing. Damages. Elements of compensation. Loss of society. Code 1906, Sec. 721.*

In a suit under Code 1906, Sec. 721, by a widow and children for the death of a husband and parent, the jury may take into consideration the loss to the wife and children of the companionship, protection and society of the husband and father but not by way of solatium.

APPEAL from the circuit court of Lee county.

HON. J. H. MITCHELL, Judge.

Suit by Mrs. Ida Moore and others against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

J. W. Buchanan and *E. O. Sykes*, for appellant.

Clayton, Mitchell & Clayton, for appellees.

No brief of counsel on either side found in the record.

McLEAN, J., delivered the opinion of the court.

The appellees, who are the widow and children of one L. D. Moore, brought suit against the appellant, alleging that their husband and father was killed by the defendant, through the willful, wanton, and gross negligence of the employees of the defendant, and that the killing occurred within the limits of the incorporated city or town of Nettleton. The suit was for fifteen thousand dollars, and the jury returned a verdict for four thousand, five hundred dollars. The evidence discloses the following facts:

Mr. Moore was killed within the corporate limits of the town of Nettleton, at about twelve o'clock midnight. The deceased had been to Memphis, and had returned that night on the train to Nettleton, and had been drinking to some extent, and was perhaps under the influence of liquor. The train which killed him was not the train on which he returned to Nettleton. Just before his death, he was seen by the engineer and fireman in charge of the train that ran over him, sitting between the rails of the railroad track, and was within less than two hundred yards of the regular passenger depot at Nettleton, and between the depot and the switch to the west of the depot. The train that killed him was going east, and was running, according to the testimony of the engineer and

fireman in charge of the train, from thirty to thirty-five miles an hour. The engineer testified that he was on the lookout; that the track was perfectly straight for a distance of from a half mile to a mile west of the point where decedent was killed; that, when he first discovered the man on the track, the engine was about two hundred feet from him; that the night was dark and foggy, and that it was impossible for him to have stopped his train running at that rate of speed within the distance shown by the glare from the headlight of the engine. The headlight was burning brightly, and ordinarily he could see an object on the track for a distance of from two hundred to three hundred yards; that the reason why he did not discover the man on the track that night was because it was dark and foggy, and the fog prevented him from seeing the man.

For the plaintiff the court instructed the jury that, even though they may believe from the testimony that the deceased was guilty of contributory negligence and was a trespasser, notwithstanding if they believe from the evidence that the injury was willfully, wantonly, or recklessly inflicted, the jury should find for the plaintiff. The second instruction related alone to damages. The third instruction related to the form of the verdict. The fourth instruction told the jury that although they may believe from the testimony that the deceased, at the time of the injury, was guilty of contributory negligence, yet if they further believe from the evidence that the deceased was in a position of peril, and the engineer saw his position of peril and appreciated his danger; and that the deceased could not by the exercise of reasonable effort extricate himself from such position in time to have avoided the injury, and that the engineer saw the deceased in such position in time to have avoided the injury by the exercise of reasonable care, and that afterwards said engineer willfully, wantonly, or recklessly ran the train upon the deceased and inflicted the inju-

ries complained of, then they should find for the plaintiff.

For the defendant only one instruction was refused, which was a peremptory instruction to find for the defendant. Instruction No. 1 for the defendant charged that if the jury believed from the testimony that the engineer, as soon as he discovered the deceased on the track, did what he could to stop the train by applying his air brakes in emergency and sanding his track and also sounding the alarm, then the jury should find for the defendant. By the second instruction for the defendant the jury was charged that if the evidence in the case showed that the deceased was guilty of contributory negligence which was the proximate cause of his death, and unless the jury believed from a preponderance of the testimony in the case that the engineer saw the deceased on the track and appreciated his peril at a sufficient distance from the deceased for the engineer to have stopped his train before striking the deceased, and that unless the engineer willfully, wantonly, and recklessly failed to stop the train, then the verdict should be for the defendant. These were all of the instructions that were given for either the plaintiff or the defendant, except instructions as to the form of the verdict, and except as to the elements of damage. The instructions were too liberal for the defendant, but of this defendant cannot complain.

It is manifest from these instructions that the only question that was submitted to the jury as to the liability of the defendant was whether the injury was inflicted through the willful, wanton, or reckless conduct upon the part of the defendant. The evidence in the case is conflicting as to when and from what point the engineer discovered, or could have discovered, the perilous position of the deceased, and as to the character of the night; the testimony for the plaintiff supporting the contention that the night was clear, and that there

was nothing to prevent the engineer from seeing the perilous position of the plaintiff at such a point as he could, by the exercise of proper care, have avoided the injury. The testimony on the part of the defendant is to the effect that the night was dark and foggy; but, as the jury has passed upon the question of fact, this court has no power to disturb the verdict.

The ground upon which the defendant based its peremptory instruction is that the night was so dark and foggy it was impossible for the train to be stopped within the distance shown by the glare of the headlight. It may be said that, if the evidence of the defendant is true upon this proposition, it fastens liability upon the defendant. The law is well settled that it is negligence in a railroad company to run its train in the nighttime at such a speed that it is impossible, by the use of ordinary means and appliances, to stop the train within the distance in which obstructions upon the track can be seen by the aid of the headlight of the engine, and that, if anything in surrounding conditions and circumstances suggests an increase of care in the operation of a railroad train to avoid peril and damage, the duty to increase such care proportionately increases. Such is in accordance with the great weight of authority and with the better reason. *Central R. R. Co. v. Ingram*, 98 Ala. 395, 12 South. 801; *Memphis R. R. Co. v. Lyon*, 62 Ala. 71; *Alabama R. R. Co. v. Jones*, 71 Ala. 487; *Louisville R. R. Co. v. Gentry*, 103 Ala. 635, 16 South. 9; *L. & N. R. Co. v. Davis*, 103 Ala. 661, 16 South. 10; *L. & N. R. Co. v. Cockran*, 105 Ala. 354, 16 South. 797; *Alabama Midland Ry. Co. v. McGill*, 121 Ala. 230, 25 South. 731, 77 Am. St. Rep. 52. In *C., N. O. & T. P. R. Co. v. Commonwealth of Kentucky*, 126 Ky. 712, 104 S. W. 771, 17 L. R. A. (N. S.) 561, it is held, affirming the rule in *L., C. & L. R. R. Co. v. Commonwealth of Kentucky*, 80 Ky. 143, 44 Am. Rep. 468, that it is an indictable offense as a common-law nuisance for a railroad, at a crossing of

the turnpike, to habitually run its trains at an unsafe and unreasonable rate of speed, and so rapidly as to endanger and injure persons traveling upon a turnpike, without giving warning signals and taking precautions to avoid injuring persons by approaching trains.

All of the authorities above cited are where the train was running in the country through a sparsely settled section, and where no speed limit by law was placed upon a railroad. To run at night a railroad train propelled by the powerful and dangerous agency of steam or electricity through an incorporated city or town, and in violation of the statute, at such a rate as to make it impossible, by the exercise of ordinary care, to stop the train within the distance shown by the glare of the headlight of the engine, must, from the necessities of the case, be regarded and looked upon as reckless conduct. The common law, as contradistinguished from statutory law, is nothing more or less than common sense honestly applied to the practical affairs of life; and it is manifest that to run a train of cars, propelled as aforesaid, at such a dangerous rate of speed, through a populous section of the country, is dangerous in the extreme, well calculated to produce injury, not only to persons on the track, but to the passengers on the train, and may well be characterized as reckless conduct, and such as the law denominates willfulness. In *Stevens v. Railroad Co.*, 81 Miss. 195, 32 South. 311, this court held that it was gross negligence to run a train in the daytime, through a populous portion of a city or town, at a dangerous rate of speed. If this be true, it is even more reckless to run a train at night through an incorporated city or town, and within the yards, at such a rate that it cannot be stopped within the distance shown by the glare of the headlight.

Instruction No. 2, given for the plaintiff, is criticised by appellant upon the following grounds: First, that it instructed the jury that they might consider the pain suffered by the deceased up to the time of his death; sec-

ond, that the instruction told the jury that they might return a verdict for punitive damages, in addition to the compensatory damages, but failed to instruct the jury what punitive damages are.

In answer to the first proposition: Granting that in the instant case death was instantaneous, and that intestate sustained no pain either mental or physical, it is no ground for reversing, because if it be conceded that there was no evidence from which the jury could infer pain, it must be presumed that the jury in its verdict did not include anything for the pain and suffering. The instruction reads: "The mental and physical suffering which he endured, if any be shown by the record." If it be error, it is therefore harmless; and looking through the entire record, and taking into consideration of the amount of the verdict, we cannot say that the instruction is reversible error. The verdict was evidently right on the facts.

As to the second proposition, it is not at all necessary that the jury should be instructed as to what constitutes punitive damages. As this court has held, it is proper to do so; but it is to be presumed that a jury understands what is meant by punitive damages, as much so as they understand what is meant by actual or compensatory damages; and if the defendant in this case had desired, the court would have given it an instruction defining what is meant by punitive or exemplary damages.

The only portion of the instruction which has given us any difficulty, although the appellant does not complain of that portion of the instruction, is that which says that, in fixing the amount of the damages, "you may take into consideration the loss to the wife and the children of the deceased of the companionship of the husband and the father." According to the great weight of authority, both in England and in America, loss to the wife and children of the society and companionship of the husband and father is not an element of damage;

but it is to be observed that all of these authorities are predicated upon a statute entirely different from the statute under consideration. Sec. 721 of the Code of 1906 provides, in actions for injuries producing death, that "in such action the party or parties suing shall recover such damages as the jury may, taking into consideration all damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit." It is to be observed that there is a very marked distinction between this statute and the former statutes in this state; and it is to be further observed that the law, in the progress of human events, has more and more, as the years succeed each other, become more liberal in allowing damages for the death of a party.

At common law an action for damages did not survive the death of the party injured. An action for the recovery of damages for the wrongful killing of a human being was the result of the statute of 9 & 10 Vict., passed in 1846, and known as "Lord Campbell's Act." By that law it is provided that "the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whose benefit such action shall be brought." Though varying considerably in their provisions, statutes of practically the same import have been enacted in most of the states of the American Union. Under Lord Campbell's act, and also under the statutes of almost all the states in this country, including the former statute of this state, it is a well-settled proposition that the jury, in estimating damages, are confined to the pecuniary loss sustained by the surviving husband, wife, parent, child, or other kindred of the deceased, and cannot take into consideration their mental suffering, nor is the jury authorized to give damages by way of the solatium. This was the rule of this state prior to the enactment of the law of 1898, which is brought forward in the Code of 1906, and is the statute now under consideration.

In order to determine the question, we may well look to the decisions of other courts construing statutes similar to the one now under consideration. The California statute (Code Civ. Proc., section 377) provided that "such damages may be given as, under all the circumstances of the case, may be just." The California court, in construing this statute, has repeatedly held that damages may be given for the mental anguish of the surviving wife, child, etc., as well as for the loss of society, and that the jury are not limited in assessing damages to the actual pecuniary loss of the plaintiff. In *Beeson v. Green M. G. M. Co.*, 57 Cal. 20, it was said: "We think that the associations and domestic relations of the parties, their kindly demeanor towards each other, the society, were parts of 'all the circumstances of the case,' for the jury to take into consideration in estimating what damage would be just from a pecuniary point of view, especially as there is nothing in the case to show that the jury were instructed that they might give damages by way of solace." The same was held in *Cook v. Clay Street Hill R. R. Co.*, 60 Cal. 604; also in *Myers v. San Francisco*, 42 Cal. 215; *McKeever v. Market Street R. R. Co.*, 59 Cal. 294; *Nehrbas v. Central Pacific R. R. Co.*, 62 Cal. 320; *Cleary v. City R. R. Co.*, 76 Cal. 240, 18 Pac. 269. In this latter case the chief justice said: "The mental anguish and suffering of the parents, in addition to the medical attendance and funeral expense, are elements which under our peculiar statute are proper to be considered in determining the amount of the recovery." In the subsequent case of *Munro v. Pacific Coast Dredging & Reclamation Co.*, 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248, the court says: "We are of opinion that the court erred in including in the instruction the words 'sorrow, grief, and mental suffering occasioned by the death of the son to his mother.' In thus directing the jury that the court fell into an error. In our opinion the damages should be

confined to the pecuniary loss suffered by the mother, and the loss of the comfort, society, support, and protection of deceased." The latest utterance of the California court is *Green v. S. C. R. R. Co.*, 67 Pac. 4, which was a suit by the husband and child for the death of the wife and mother, in which it was held that: "As damages, all pecuniary loss suffered by them from loss of society," etc. (In this connection we call attention to the fact that in 13 Cyc. it is stated that: "In an action by a husband or wife for the death of his or her spouse, damages cannot be recovered for the loss of the society of the deceased;" and among other authorities refers to *Munro v. Pacific Coast Dredging Co.*, 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; *Beeson v. Green Mountain Gold Mining Co.*, 57 Cal. 20. These authorities hold to the contrary, as we have shown above.)

The Virginia statute (Code 1873, ch. 145, section 8) provides that "the jury in any such action may award such damages as to it may seem fair and just." In construing this statute the court held, in *Matthews v. Warner*, 70 Va. 570, 26 Am. Rep. 396, and *Baltimore R. Co. v. Noell*, 73 Va. 394, that "the jury were not confined to mere pecuniary damages, but may award such damages as it may deem to be fair and just under all the circumstances of the case." The South Carolina statute is that "the jury may give such damages as they may think proportioned to the injury resulting." In *Petrie v. Columbia R. Co.*, 29 S. C. 303, 7 S. E. 515, it was held that under this statute it was not necessary for the plaintiffs, the children of the deceased, to prove that they had been pecuniarily damaged, or that they had any legal claim on the deceased for their support. In *Patterson v. Wallace*, 1 Macq. 748 (Scotland), damages are allowed by way of solatium. In *Matthews v. Warner*, *supra*, the court, in discussing this question, says: "It was argued very earnestly by the learned counsel for the appellant that such a construction of the statute

as we have here given would result in great injustice, if juries are to be turned loose to assess damages according to their own notions as to compensation for the mental suffering and agony of a mother losing her child, or of a wife losing her husband, unrestrained by statutory enactment, confining them to the pecuniary injury resulting in death. There are two answers to such arguments. One is: '*Ita est scripta lex.*' The other is: We must presume the legislature knew the force and effect of their enactments. They must have been cognizant of the statutes and the decisions under them, and they must with such knowledge have known the force and effect of such language used.'" The Virginia statute, which was being considered by the court, was that "the jury in any such action may award such damages as to it may seem fair and just," and the instruction complained of simply followed the statute.

In *St. Louis & N. A. R. Co. v. Mathis*, 76 Ark. 184, 91 S. W. 763, 113 Am. St. Rep. 85, it was held that, in an action by minor children for the death of their father, the industry, commercial character, and parental care and affection of the deceased may be taken into consideration in estimating the damages. In *St. Louis, Iron Mountain & Southern Ry. Co. v. Haist*, 71 Ark. 258, 72 S. W. 893, 100 Am. St. Rep. 65, it was held that a minor, in a suit for the death of her father, is entitled to recover for the care, support, and maintenance, and such advantages and benefits in the way of training and education, both morally and intellectually, as she would have received from him if his death had not occurred.

By far the best-considered case upon this subject to be found in all the books is *Florida R. R. Co. v. Foxworth*, 41 Fla. 1, 25 South. 338, 79 Am. St. Rep. 149. The Florida statute (Laws 1883, ch. 3439) provides that the jury may give such damages "as the party entitled to sue may have sustained by reason of the death of

the party killed.” After a very exhaustive and thorough investigation of the subject, the conclusion reached by the Florida court is as follows: “In estimating the pecuniary loss sustained by the widow, the jury may properly take into consideration her loss of the comfort, protection, and society of the husband, in the light of all the evidence in the case relating to the character, habits, and conduct of the husband, and to the marital relations between the parties at the time of and prior to his death; and they may also consider his services in assisting in the care of the family, if any, but the widow is not entitled to recover for her mental anxiety or distress over the death of her husband,” etc.

In determining what damages are recovered in actions like the one under consideration, we must look alone to the statute. This is the measure and the limit of the right; and after a full consideration of the question our conclusion is that, in a suit by a widow and children for the death of the husband and parent, the jury may take into consideration the loss to the wife and children of the companionship, protection, and society of the husband and father, but not by way of solatium. In *Telephone Co. v. Anderson*, 89 Miss. 732, 41 South. 263, the exact question now under consideration was not discussed, though the present statute was under review by the court.

Affirmed.

MISSISSIPPI CENTRAL RAILROAD CO. *v.* MRS. M. E. WALDEN.

[58 South. 538.]

DAMAGES. *Injury to stock. Sufficiency of evidence. Value. Opinion evidence.*

In a suit for damages for killing a cow, it was not error for the court to refuse to allow a witness to answer the question "what would be the value of a cow two and a half years old, light red in color and giving milk," as the question afforded no data from which the witness could have based an intelligent opinion as to value.

APPEAL from the circuit court of Jefferson Davis county.

HON. A. E. WEATHERSBY, Judge.

Suit by Mrs. M. E. Walden against the Mississippi Central Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Truly, Ratcliff & Truly and *H. S. Buescher*, for appellant.

During the trial of the case appellant's attorney attempted to introduce three of the jurors for the purpose of proving the reasonable market value of a cow such as described by plaintiff, which, however, was not permitted by the court. This, in our opinion, is a reversible error under the decision of this court in the case of *Bob White v. State*, 73 Miss. 50, in which Judge Whitfield among other things says: "That a juror may be a witness on a trial before himself and his fellows is well settled." *Roy v. Horsley*, 25 Am. Rep. 540, note; and, "A juror may always be a witness for either party and still retain his seat as a juror." *Fellows case*, 5 Me. 335, etc.

J. E. Parker, for appellee.

It is insisted by the appellant that the trial court violated the rule laid down by the case of *White v. State*, 73 Miss. 50 in not permitting jurors in the case to testify. The record shows that no juror was refused to testify for the reason that he was a juror, but that the juror witnesses were incompetent to testify in the manner interrogated. For it is manifestly incompetent for any witness to be permitted to answer the hypothetical question, "I will ask you what would be the value of a light red cow, two and a half or three years old, giving milk, weight unknown." The question is too indefinite and uncertain to permit an answer thereto to be received in evidence. But we submit that the rule laid down in the *White* case, nor any other case would permit a party to a suit to interrogate a juror concerning his opinion of the evidence before him upon the matters to be decided by him, prior to his verdict.

Cook, J., delivered the opinion of the court.

Appellee recovered judgment against appellant for the sum of seventy-five dollars the value of a cow killed by appellant's locomotive. Liability is confessed; but complaint is made at the value of the cow, fixed by the jury. It is claimed that this error was brought about by the action of the court in misdirecting the jury as to the law. The court, in effect, instructed the jury that they were limited to one of two values, thirty dollars or seventy-five dollars. It is further insisted that there was evidence warranting the jury to fix the value of the cow at twenty-five dollars.

In our opinion, the evidence fully justified the verdict of the jury; in fact, there was no other verdict the jury could have rendered. Only one witness, qualified to testify, fixed the value of the cow, he being the only witness who knew the cow before she was killed, and he fixed her value at seventy-five dollars. The other witnesses whom

the court permitted to testify had never seen the cow before she was killed, and not until after she had been mutilated; consequently they knew nothing about the qualities of the animal.

Members of the jury, sworn as witnesses for defendant, were not permitted to testify, and the rejection of their testimony is assigned as error. They were asked: "What would be the value of a cow two and one-half years old, light red in color, and giving milk?" This question afforded no data upon which the witnesses could have based an intelligent opinion as to value, and the court was right in sustaining an objection to this testimony.

If there was error at all, it consisted in the court instructing the jury that they could find either thirty dollars or seventy-five dollars. In our opinion, the court ought to have peremptorily instructed the jury to find for the plaintiff, and assess the damages at seventy-five dollars.

Affirmed.

B. F. SUMRALL ET AL v. KITSELMAN BROS.

[58 South. 594.]

1. PRINCIPAL AND AGENT. *Evidence of agency. Sales. Action for price. Agent's authority.*

The statement of an agent as to his agency has no probative value to establish such agency.

2. SALES. *Suit for price. Liability.*

Where plaintiffs' agent took an order from defendant for a bill of wire and also took orders from several others for wire and shipped the total amount to defendant without his knowledge and defendant by agreement with the agent paid the freight on the whole shipment, a part of which was refunded to him by the selling agent, and defendant took from the carrier's station the

part of the goods which he had ordered, in such case defendant was not liable for the total shipment but only for the part he had ordered and taken out.

3. PRINCIPAL AND AGENT. *Agents authority. Third person.*

Where an agent authorized to sell but not to collect, sells goods to a purchaser and collects the purchase money but fails to turn it over to his principal, the purchaser is not released thereby as he dealt with the agent at his peril; he should have inquired and satisfied himself as to the agent's authority to collect.

APPEAL from the circuit court of Jones county.

HON. PAUL B. JOHNSON, Judge.

Suit by Kitseleman Bros. against B. F. Sumrall and others. From a judgment for plaintiff, defendants appeal.

This suit originated upon a demand made by the appellees against the appellants, Sumrall and Bush, on open account for two hundred, thirty-two dollars and thirty cents; the claim being based upon certain articles of wire fencing. The record shows that one Leslie, acting as soliciting agent for appellees, took an order for appellants for wire fencing, amounting to seventy dollars and sixty cents, with instructions to have it shipped to Laurel, Mississippi. Leslie took other orders, the total amount of which, including appellants' order, amounted to two hundred, thirty-two dollars and thirty cents, and had appellees ship all the goods to appellants. This was done without appellants' knowledge. Appellants paid Leslie for their part of the goods and took them from the station, and left the balance in the depot, according to the understanding with Leslie. Leslie never turned any of the money collected from appellants over to appellees. Appellees then brought suit against the appellants for the whole amount of the bill shipped to them. It was shown at the trial that appellees had only given Leslie authority to solicit orders for wire fencing, but had not given him authority to collect from the purchasers any part of the purchase price. Les-

lie's authority to act for appellees is contained in a letter setting out the terms upon which goods are shipped to purchasers, which are either cash in advance, shipments sent C. O. D., or upon a deposit being made in a bank to the credit of the shipper, or where a bank will approve the financial standing of the purchaser. The letter contains the following stipulations: "If you desire to solicit orders on the conditions stated herein, it will be entirely satisfactory with us for you to do so, but we cannot accept or ship goods on other conditions. . . . Of course, if your orders are any to be shipped to merchants or dealers who have a good commercial rating in Bradstreet's or Dun's reports, we will ship goods without question." Appellees' sales manager testifies positively that never, at any time, did his house give, either verbally or in writing, any authority to Leslie to act as agent for the collection of money, or to settle with parties to whom goods were shipped.

It was admitted on the trial that if Leslie were present as a witness he would testify that he was acting as agent of appellees when he collected the sum of seventy dollars and sixty cents from appellants, and when he collected other amounts from other purchasers who got part of the goods contained in this shipment.

Plaintiffs below (appellees here) contend that, since appellants accepted the entire shipment addressed to them, and paid freight on it all (part of which was afterwards refunded to them by Leslie), they are liable for the whole shipment, and also that they paid their money to Leslie, at their peril, without satisfying themselves as to his authority to collect the same. Defendants contend that they had nothing to do with a large part of the shipment, and it was shipped in their name without authority or knowledge on their part, and that they advanced the amount of freight, a part of which was afterwards refunded them by Leslie, who told them that he had the goods shipped thus as a matter of con-

venience; that, having paid Leslie, the agent of the plaintiffs, for their portion of the shipment, they were not liable to plaintiffs for any sum whatever. The court gave a peremptory instruction to the jury to find for plaintiffs for the full amount sued for. From this judgment, the defendants appeal.

R. E. Halsell, for appellants.

The peremptory instruction given by the court for plaintiff should not have been granted.

On the agreed testimony of the witness L. B. Leslie, agent of defendant below, which was admitted and read to the jury, the nature of the contract between the appellants and the appellees is fully set out, and on this testimony alone the case should have gone to the jury. Leslie's testimony shows that he was the agent of the appellees, and that the appellants simply purchased a small part of the wire, knew nothing about others, and the wire for the other farmers coming in their names, had no interest in the remainder, which was sold to various other farmers by Leslie. When the wire came, at Leslie's request, appellants advanced the money to Leslie to pay the freight, and Leslie gave them back pro rata of the freight. As to the balance of the wire, they had no interest in it, did not order it, did not receive it, and could not have received it, because the testimony shows that the parties who owned that were there and received same from Leslie.

Suppose a law book agent should come to Laurel and sell me some law books, and then go to a dozen other lawyers and take orders from them, and when he had completed taking the orders, should then without my consent ship all the books sold, to me and the other lawyers, in my name, would I be liable not only for my books, but the books sold to the other lawyers? I fail to see how I should be held liable under this state of facts for the other lawyers' books. This is exactly like the case

at bar. Leslie sold a small quantity of wire to Sumrall, and a small quantity to Bush, and a small quantity to about twenty other farmers, and without the knowledge of Bush, or Sumrall, and without their consent to become liable for the collection of the money due for the balance of the wire, shipped the whole lot to Sumrall, and, simply because Sumrall and Bush put up the money to pay the freight, which is nothing unusual, and received all the freight money back, less their pro rata due on their wire, should they be held liable for all the wire shipped? I certainly do not think so.

This is a different case from the case where a party receives part of the goods, and is dissatisfied with the balance, and is held liable because he does not return the whole shipment. The appellants in this case never ordered all of the wire, simply a part of it, and only received their part.

The peremptory instruction should not have been granted for a further reason. It was shown that certain payments, amounting to about one hundred and forty dollars had been paid by different parties, and this had been turned over to Leslie, the agent of the plaintiffs below, and it was admitted that he had received the money. That being true the appellants should have had credit for the amount paid out to Leslie.

It was further shown by the testimony that the appellees had knowledge that this money had been paid to Leslie, and in the testimony is a letter from appellees in which they agree to allow the amount paid to Leslie, provided Sumrall would pay the balance. The letter is addressed to B. F. Sumrall, and is not addressed to Bush at all, and there is nothing in the testimony to show that either Bush or Sumrall knew that all of the wire would be shipped to them, or either of them; so we think the peremptory instruction should not have been granted, and the case ought to be reversed.

T. H. Oden, for appellees.

It is contended by appellants that L. B. Leslie was the agent of Kitseleman Brothers, and that payment to him was payment of the debt.

In the first place it will be observed that appellants have not even proved that they had paid Leslie the whole amount of the debt; for by the agreed statement of facts in the record, by the letter exhibit "C" to the testimony of B. F. Sumrall's testimony, it is shown that only ninety-six dollars or ninety-seven dollars was paid Leslie in all.

It will be noted that attorney for appellee did not admit on the trial of this case that Leslie was its agent at all; but only admitted that if he was present, he would swear that he was the agent of appellee, and sold to B. F. Sumrall and R. Bush, and so on. There is no admission in the record anywhere regarding the scope of authority of his agency, and certainly an admission that a witness would swear to a certain fact, if present, cannot be given any greater weight than his sworn testimony would be given. If Leslie had been present and swore what was admitted that he would swear, his testimony would not and could not have been construed to establish agency for the purpose of collecting money for Kitseleman Brothers.

Appellants in this case plead payment and the burden is on them to prove payment by a preponderance of the evidence. *Greenburg v. Saul*, 45 South. 569; see, also 39 Cent. Dig., "Payment," Sec. 196, and cases cited. They also assert affirmatively that Leslie was the agent of Kitseleman Brothers, and the burden is on them also, to show, by clear and convincing evidence that he was their agent (see 10 Ency. of Evid., "Principal and Agent," page 6, par. 1, and cases there cited); and not only had authority to take orders for wire as agent for Kitseleman Brothers, but likewise, had authority to receive payment for the wire also. See 39 Cent. Dig., 335,

Sec. 196 (c); also 10 Ency. of Evid. 8, "Authority to Receive Payment," and cases there cited.

There is no evidence in the record to show any of these facts, but on the contrary there is clear and convincing evidence to show that Leslie had no authority to collect any money at all from appellants. See testimony of Frank S. Baughn, and exhibits to same.

If Leslie had been present at the trial, and swore to each and every fact set forth in the agreed statement of facts, then his evidence would have been irrelevant and incompetent for two reasons. First, because the agency and authority of Leslie, if he was an agent of Kitselman Brothers, as well as the scope of his authority as an agent, is clearly fixed by writing in the letter which was written by him, to Kitselman Brothers, in January, 1909, which is exhibit "D," to the testimony of Frank S. Baughn; and it is clear and well-established rule of law, that where the agent's authority is conferred by a written instrument, parol evidence is not admissible to enlarge, extend, or in any manner change the written authority. See 10 Ency. of Ev., "Principal and Agent," page 13 under title "To Enlarge Written Power of Attorney," and cases there cited. Second, from the proof of agency to take orders for goods there can be no inference drawn, that the agent had authority, either expressed or implied, to collect for them. See 13 Cyc. 1358, title (c), "As to Payment," and cases cited under notes 50 and 51; see, also same book, page 1368, par. d, title, "To Collect," and cases cited under the notes 24, 25, and 26.

As I see it, the plaintiff in this case could admit that Leslie was its agent to take orders for wire, etc.; and still a peremptory instruction for it would be proper because the burden is on the defendants to show that Leslie was the agent of Kitselman Brothers to collect and receive payment for the wire, and there is no inference or presumption of authority to collect from authority

to receive orders. See *Simon v. Johnson*, 13 South. 491; *Bailey v. Partridge*, 134 Ill. 188; *Kane v. Barstow*, 42 Kan. 465, Am. St. Rep. 490; *Higgins v. Moore*, 34 N. Y. 117; *Lakeside Press Co. v. Campbell*, 22 South. 878.

In 31 Cyc. at top of page 1358, the author states the rule in the following language: "But it is generally held that the mere authority to solicit orders or to take contracts to be submitted to the principal for approval, carries no implied power to collect at any time. And the same principal denies to brokers or traveling salesmen, not having possession of the goods, but selling for future delivery, to be paid for upon delivery, or at any other future time, any authority, upon these facts alone, to collect payment for such goods. And certainly where goods are sold by an agent and there is notice, direct or implied, to pay the price to the principal payment by the vendee to the agent will not bind the principal, or protect the vendee. See cases cited here, notes 50, 51 and 52.

WHITFIELD, C.

On the case made by this record, two things are clear: First, that Leslie was the agent of appellees to solicit orders. Second, that he was not their agent to collect. On this latter proposition, see the following authorities: Cyc. vol. 13, p. 1358, notes 50 and 51; *Id.* p. 1368, par. D, and authorities cited under notes 24, 25, and 26.

The statement of Leslie that he was the agent, of course, has no probative value as establishing agency; and there is no other evidence in the record of any agency to collect on the part of Leslie. The result of these two facts is twofold: First. Sumrall and Bush are not liable for anything, except the wire, which they themselves bought. They had nothing to do with Leslie signing their names to the order, nothing to do with the shipment of all the goods to them, and their payment of the whole freight was by agreement with Leslie, sim-

ply for his convenience. Second. Sumrall and Bush are liable to the appellees for the amount they owed them for their wire. They dealt with Leslie at their peril. They should have inquired and satisfied themselves as to his agency.. It is a great hardship that they should have to pay twice for their wire; but it would be a greater hardship on the larger body of litigants in the long run that a thoroughly established principle of law should be set aside to save them. Hard precedents make bad law.

PER CURIAM. The above opinion is adopted as the opinion of the court; and for the reasons therein indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

Suggestion of error filed and overruled.

ILLINOIS CENTRAL RAILROAD CO. v. QUITMAN JAMES.

[58 South. 648.]

CARRIERS. *Transportation of dead bodies. Punitive damages. Sufficiency of evidence.*

In a suit for punitive damages, wherein gross negligence is charged on the part of the railroad employees which resulted in the dropping of a box containing the corpse of plaintiff's child while loading the same into a baggage car, evidence held not sufficient to charge the defendant's employees with wantonness, recklessness or wilfulness, such as to warrant the infliction of punitive damages.

APPEAL from the circuit court of Lincoln county.

HON. D. M. MILLER, Judge.

Suit by Quitman James against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Mayes & Longstreet, for appellant.

The case is of more than passing interest for several reasons, not the least one being that so far as we have been able to discover after an exhaustive investigation of the authorities, this is the first case in which a recovery has been obtained on the grounds disclosed by the proof. The legal status of dead human bodies and the extent and nature of the rights in them of living relatives is an interesting question and has been the theme of many scholarly dissertations and learned disputations. Under the common law the corpse of a human body was not regarded as property, and this view has also been adopted in some of the states of this country. This theory has been interestingly and forcibly announced in the leading case of *Long v. Railroad Co.*, 6 L. R. A. (N. S.) 883, in which case the court held that the parents of an infant child are not entitled under the law to recover damages for mental pain and anxiety caused by the mutilation of the dead body of the infant. The court adopts the common law rule that there can be no such thing as property in human remains, and, therefore, no action for civil damages will lie, even for wilful mutilation of a dead body. Though the reasoning in this case is plausible and strong and is supported by precedents and authorities, and though, if adopted by this court it would be decisive in the present case in favor of appellant, we are frank to say that the conclusion reached by the court does not commend itself to us, and we would not be understood as urging this court to adopt the principle that there can be no right of possession or ownership in a human corpse.

In the case of *Hochheimer v. Railroad Co.*, 74 S. W. 222, the court held that while there is a legal right in the bodies of the dead which the courts will recognize and protect, there can be no recovery for mental anxiety

caused by the dead body of a relative being thrown from a wagon by the negligent operation of a railroad train, in the absence of any injury to the body.

An interesting case often cited is that of *Larson v. Chase*, 14 L. R. A. 88, in which the court, while conceding that there is no strictly commercial property in a human corpse, holds that there is a right of possession and preservation for burial purposes, and allowed damages for mental suffering on proof of the unlawful mutilation and dissection of a dead body. Of course, the wrong in the Larson case was not only unlawful, but was consciously and purposely done; was an act or undoubted wantonness and wilfulness.

In the opinions in these leading cases are found exhaustive reviews and discussions of the law, both ecclesiastical and common, and as modified by some of our courts, though most of this, so far as the present case is concerned, is interesting merely from an academic standpoint. A very careful and thorough examination of the authorities failed to reveal a single case where upon any theory damages were allowed where, as in the present case, there was no injury or mutilation of the corpse and no pecuniary damage or loss. Our own court has not, so far as we know, declared itself upon the subject of the rights in a human corpse. But so far as the case at bar is concerned, it is immaterial what theory is adopted as under the facts of the case and, under the established law in Mississippi on the subject of punitive damages, the instruction granted the appellee was obviously erroneous and constituted reversible error. The instruction and the only instruction given for appellee was as follows:

“The court instructs the jury for the plaintiff that if they believe from the evidence that the coffin containing the body of plaintiff’s child was dropped by the servants and employees of the defendant while they were undertaking to place it upon defendant’s baggage car, and

that by reason of such dropping the coffin or box containing same was injured, and the body of the child disarranged, and if they further believe that plaintiff was injured thereby in that he was caused to suffer mental pain and distress if any, and if they further believe the falling of the coffin and such mental pain and distress, if any, were caused on account of the wilful, reckless or capricious negligence, if any, in the handling of the coffin, or moving of the train by the agents and servants of the defendant, then in that case the jury may find for the plaintiff and in their discretion assess exemplary damages not to exceed the amount sued for."

The only injury that appellee claims, was mental pain and distress occasioned by the falling of the coffin and the disarranging of the body of the corpse. There was no mutilation of the corpse, no delay in funeral arrangements, no pecuniary loss, nothing but the alleged mental distress and anxiety of the appellee.

Now there is no rule of law more firmly settled in Mississippi than the long established and almost universal rule of law that no action lies for the recovery of damages for mere mental suffering, disconnected from physical injury, and not the result of the wilful wrong of the defendant. *Western Union v. Rogers*, 68 Miss. 748.

This principle has been often reiterated, and was recently enunciated in the case of *Duncan v. Telegraph Co.*, 93 Miss. 503, in which the court says:

"The Rogers case was decided in 1891 and has stood as the law of this state for seventeen years. Since it was decided we have had many sessions of the legislature without any change being made in the law, and we shall not now disturb the decision."

Appellee does not claim any physical injury to himself. He does not claim there was any mutilation of or injury to the corpse. His sole claim is that he suffered mental anxiety as the result of the falling of the box and the disarrangement of the corpse.

Now, no matter which theory this court may adopt as to the rights in a human corpse, and we shall urge neither of them upon this court, the indisputable fact remains that under the Mississippi law, the authorization of punitive damages is erroneous where the gravamen of the action is mental distress and anxiety alone, unaccompanied by physical injury, unless the act complained of was wilful and wanton.

Cassedy & Butler, for appellee.

It is not necessary to present any extended review of the authorities announcing the law applicable to this case.

We contend that so far as this case is concerned, it is immaterial whether this court adopts the rule announced by the Oklahoma court with reference to this class of cases, or whether it adopts the rule announced in such cases as *Larson v. Chase*, 14 L. R. A. 85, and *Renihan v. Wright*, 9 L. R. A. 514. Under either view, the plaintiff is entitled to recover.

We contend that even though the facts in this case do not show a case for punitive damages, nevertheless mental suffering is an element of damages, and that this case falls within the exception of the recognized rule, that damages for mental suffering cannot be recovered when disconnected from physical injury, where the defendant was guilty of mere negligence.

We concede that the general rule is as announced in *Western Union Telegraph Co. v. Rogers*, 68 Miss. 786, 13 L. R. A. 859, 21 Am. St. Rep. 300; *Duncan v. Telegraph Co.*, 96 Miss. 500; *Dorrah v. Railroad Co.*, 65 Miss. 17; *Pullman Co. v. Kelly*, 86 Miss. 102.

There is however, certain well-established exceptions to that rule and some of them are recognized in the leading case of *Dorrah v. Railroad*, *supra*; such for instance as a suit for breach of promise of marriage.

In the recent and well-considered case of *Kurpguit v. Kirby*, 88 Neb. 72, 33 L. R. A. (N. S.) 98, and the ex-

tended note to that case, a great many other classes of cases are pointed out as falling within the exceptions, such as malicious prosecution, action for criminal conversation, digging up the dead body of plaintiff's son. conductor kissing a female passenger, being deprived of the remains of the dead body of a daughter by the undertaker to whose care the body has been committed, the abduction of children, and in actions by a parent for the seduction of a daughter, etc.

One of the cases cited by the Nebraska court is *Renihan v. Wright*, 9 L. R. A. 514. In this case it was held that mental anguish suffered by the next of kin by reason of a breach by a third person who had contracted that they would safely keep a corpse until they should desire to inter the same, may be considered in the assessment of damages for such breach.

Another important case on this subject is *Larson v. Chase*, 14 L. R. A. 85. It was there held that for the purpose of preservation and burial, the dead body belongs to the husband or the wife or next of kin, and for any infraction of such right an action for damages will lie; and in such an action recovery might be had for injury to the feelings and mental suffering resulting from the wrongful act.

In the *Larson* case the court said: "It was early settled that substantial damages might be recovered in a class of torts where the only injury suffered is mental—as for example—an assault without physical contact. So too in actions for false imprisonment where the plaintiff was not touched by the defendant, substantial damages have been recovered, though physically the plaintiff did not suffer any actual detriment. In an action for seduction, substantial damages are allowed although there be no proof of actual pecuniary damages, other than the nominal damages which the law presumes. The same is true in actions for breach of promise of marriage. Wherever the act complained of constitutes a violation

of some legal right of the plaintiff which always in contemplation of law causes injury, he is entitled to recover all damages, which are the proximate and natural consequences of the wrongful act.”

These are not the only cases by any means that announce this doctrine, but they seem to be well-considered cases, and refer to and elaborate the various rulings by other courts.

So that we say that under the peculiar facts of this case, irrespective of any question of wilful wrong, that mental suffering is and of necessity must be an element of damages. When the railroad company contracted to transport the dead body of plaintiff's child, it knew and of necessity must have known that any injury to it would result in mental anguish and distress, and therefore it cannot be said that such damages were not within the contemplation of the parties at the time they made this contract; hence we say that these damages should be taken into consideration by the jury in estimating the amount.

If, however, the court should conclude that by reason of the doctrine announced in *Dorrah*, *Rogers*, *Kelly* and *Duncan* cases, that mental suffering was not an element of damages, if the case was one of mere negligence, we are nevertheless under the facts of this case and under the very authority which counsel suggests precludes recovery in any view, entitled to have this element of damages by the jury.

Cook, J., delivered the opinion of the court.

This action is predicated upon the alleged reckless, wanton, and willful negligence of the appellant railroad company in the transportation of the corpse of appellee's two months old infant. The record shows that the box inclosing the corpse was delivered to the agent of the company at Magnolia, to be carried to Martinsville for interment. When the train arrived at the station,

the trunks and other baggage were loaded upon the baggage car from a platform, ten to fifteen feet from the door of the car, the corpse being on the same platform. The train remained at the station three or four minutes, the usual or a little more than the usual time, and the baggage was all safely loaded. The porters, charged with the duty of loading the baggage, then started with the box containing the corpse from the platform to the train, for the purpose of placing it in the baggage car. Here there is some conflict in the evidence; the porters and other railroad employees saying that the train started to move after they had gotten the corpse to the door of the car, while the brother of appellee said it started before they picked it up from the platform. This variance in the testimony is, in our opinion, of very little, if any, importance. Suffice it to say that the train was moving slowly (having run about ten or twelve feet before it was stopped) when the porters attempted to lift the box and place same in the baggage car, and because of some obstruction the box was dropped upon the ground. Appellee did not see this unfortunate accident, and did not know of its occurrence until some time afterwards. The train was then stopped, and the corpse placed in the baggage car. The brother of appellee was requested to go back in the car and examine the corpse, to ascertain if any damage had been done to the dead child. The box and casket were opened, and according to the brother's testimony the little body had been turned completely over upon its face. This was the utmost extent of the damage to or disarrangement of the body, which was remedied and the coffin closed. The father of the child did not know of this inspection of the corpse, but did know of it later, just how long afterwards does not appear. Indeed there is nothing in the record to show when he first heard of the accident, whether the day of its occurrence or some other day.

It is manifest from all the testimony, if there was negligence in moving the train, it is chargeable to the engi-

neer, because he put the train in motion before he received the necessary signal authorizing him to do so, and, had he not done so, the accident would not have occurred. The engineer testified that he was looking out for the signal, and was almost sure the conductor gave him the signal, and would have sworn that he did, but for the fact that the conductor said he did not. This is the substance of his statement. To excuse his mistake, he says the train was being drawn by two locomotives, he being in charge of the one in the lead; that steam was escaping from the rear locomotive and from the steam pipes connected with the heating system of the train. This steam may have interrupted his vision to such an extent as to have induced him to think that the conductor signaled him. The jury returned a verdict for plaintiff below for nine hundred and fifty dollars. This was a very deplorable and harrowing accident, and doubtless all who witnessed it were shocked. The sentiment which recognizes the sanctity of the dead body of a human being is approved by all normal persons as natural, noble, and fine; and if there was any evidence before the jury warranting a belief that the employees of the railroad company were guilty of willful or wanton conduct in the handling of the corpse of this infant, we could not disturb the verdict of the jury.

The trial court instructed the jury that they were authorized to inflict punitive damages if they believed that the accident was caused on account of the willful, reckless, or capricious negligence in the handling of the coffin or moving the train. Counsel for appellee, in closing their brief, say: "The damage done in this case was never claimed to be a matter of dollars and nickels; to the contrary, the entire suit was for the gross carelessness in the handling of the coffin, and sounded in punitive damages, rather than compensative damages. For this reason the injury to the body and the coffin is only material in determining the extent of the violence of the fall, and has nothing to do with the right of recovery."

We have quoted this statement of counsel, because it clearly and succinctly defines the issue before this court. The damage to the box containing the coffin was inconsequential, and the injury to the corpse consisted in turning it over in the coffin. If there was negligence in the handling of the train, upon the engineer must rest the blame. If there was negligence in the handling of the corpse, it is chargeable to the porters.

As all men are fallible, and may be honestly mistaken, and may act upon this mistake without incurring any imputation of carelessness, we feel justified in acquitting the engineer of negligence under the undisputed evidence of two witnesses. True, the witnesses were railroad employees, one of whom has no interest in this controversy. It is also true that the jury, in weighing their testimony, had a right to take into consideration their relationship to the appellant; but we know of no rule of law, or reason which would warrant a jury in discarding the testimony of an employee, when no witness or circumstance contradicts his evidence, and when the facts related by the witness are consistent with reason and the circumstances surrounding the event about which he testifies. The porters were active and zealous in their efforts to place the corpse upon the train, and of this there can be no doubt. But did their zeal lead them into attempting to do a thing which a prudent man would characterize as hazardous in the extreme, or were they performing their duty in a capricious or reckless manner, or were they reckless and indifferent as to the consequences, or were they so grossly negligent as to incur the imputation of willfulness? Upon a proper answer to these questions the decision of this case depends.

The train had just begun to move, either before they lifted the coffin from the platform, or after they reached the door of the baggage car. They were handling the corpse of an infant, which together with the coffin weighed about seventy-five pounds. They were charged

with the duty of placing this corpse upon that train, and they were probably impressed with the importance of getting it on. In spite of the fact that the train was moving slowly, and in spite of the fact that they might have refused to attempt the loading until the train was brought to a standstill, they did put the box up into the car; and because the trunks already loaded were near the door, and obstructed the way, the box slipped and fell to the earth. This is the sum and substance of their offending from the standpoint of appellee.

Why did the porters not succeed in safely placing the box on the train? The answer is made clear by the evidence. The trunks loaded at Magnolia were still near the door, the baggageman not having moved them away, and when the porters placed the box partially in the car, they retained their hold on it, expecting the baggageman to move a trunk and then pull the box inside. The baggageman, seeing the situation, attempted to pull the signal to the engineer to stop the train. In the meantime the porters were walking alongside holding the box, until the train could be stopped, when they ran against a baggage truck and had to release their hold, thus causing the box to fall to the earth. This is clear and indisputable from a careful reading and re-reading of the entire record, and there is no other probable or possible theory deducible from the evidence of all or any one of the witnesses to account for this unfortunate occurrence.

We shall not enter into discussion of the interesting questions of law regarding property rights in dead bodies. This is purely academic and would be profitless. This case must stand or fall upon the issue stated in counsel's brief. If the facts, considered from any angle, warranted the instruction authorizing the jury to inflict punitive damages, this case must be affirmed.

We can see nothing in the evidence upon which a reasonably impartial man could charge any employee with wantonness, recklessness, or willfulness.

Reversed and remanded.

EDWARD HINES v. IMPERIAL NAVAL STORE Co.

[58 South. 650.]

1. **TRESPASS TO REAL ESTATE.** *Damages. Equity. Report of master. Findings. Conclusiveness. Punitive damages. When awarded. Corporation. Conveyances. Landlord and tenant.*

Where one boxed the trees and extracted the turpentine therefrom without the consent of the owner, he was liable only for the actual damages sustained by the owner and the owner had the option of recovering either the full amount of damage, that necessarily as well as that unnecessarily inflicted upon the trees in the process of extracting the products therefrom; or of recovering these products, or their value, together with the amount of any damage unnecessarily inflicted upon the trees in the process of extraction.

2. **SAME.**

In such case if the owner elects to take the products or their value, he cannot also recover the damage necessarily inflicted upon the trees in the process of extracting these products.

3. **EQUITY.** *Report of master. Conclusiveness of findings.*

The report of a master appointed by the chancery court to make findings in a case has the effect of the verdict of a jury in so far only as it deals with findings of facts supported by competent evidence.

4. **EQUITY.** *Report of master. Punitive damages. When awarded.*

Punitive damages are awarded by way of punishment, and the imposition of this punishment in a suit in chancery lies as completely in the discretion of the chancellor as it does in the jury in cases tried by a jury.

5. **SAME.**

Whether or not this punishment shall be imposed is not a question of fact at all, and consequently the recommendation of the master relative thereto, may be followed by the chancellor or not, as in his judgment may seem best under all the circumstances in the case.

6. CORPORATIONS. Deeds. Validity. Equitable title.

An unsealed deed executed by a corporation is insufficient to convey the legal title; it does however convey the equitable title, which title a court of equity will protect and enforce.

7. LANDLORD AND TENANT. Action for damages. Scope of inquiry.

Where a lease to a grantee to extract turpentine from trees was for a term of three years from the date of boxing, the grantor reserving the right to designate what timber should be first boxed and the boxing of the timber was not begun until after the expiration of seven years from the date of the lease, and when begun the land had been purchased by plaintiff who brought suit against the vendees claiming damages by reason of the vendee having without his consent boxed and extracted turpentine and rosin from a large number of trees on the leased lands, and claiming that the boxing did not begin in a reasonable time, the time when boxing should begin not being specified in the lease, in such a suit the question of the reasonableness or unreasonableness of the lease cannot be drawn in question.

8. SAME.

When a valid contract is once made for the sale of timber rights which specified no time for the completion of the contract, the court will construe the contract so as to enforce the completion within a reasonable time, determinable from all the facts surrounding each particular case; but will not declare any such contract unreasonable so as to avoid the consequences except on a direct proceeding to cancel the lease.

APPEAL from the chancery court of Hancock county.

HON. T. A. WOOD, Chancellor.

Suit by Edward Hines against the Imperial Naval Stores Company. From a decree both sides appeal.

The facts are fully stated in the opinion of the court.

Bowers & Griffith, for appellant.

W. J. Gex, for appellee.

Counsel on both sides filed elaborate briefs covering all points in the case, but too long for publication.

Argued orally by *V. A. Griffith*, for appellant.

Argued orally by *W. J. Gex*, for appellee.

SMITH, J., delivered the opinion of the court.

This is a suit instituted by attachment, in which appellant seeks to recover damages alleged to have been sustained by him by reason of appellee having, without his consent, boxed and extracted the turpentine and rosin from a large number of pine trees situated upon his (appellant's) land. The bill prayed for actual and punitive damages. There was a decree for appellant, but for less than he thought he was entitled to, from which decree this cause comes to us on both direct and cross-appeal.

The land has been divided by the allegations of the bill into three groups, designated as A, B, and C. A master was appointed by the chancellor, and directed to inquire into the matters complained of and report his findings thereon to the court. On the coming in of this report, exceptions were filed thereto by both complainant and defendant, some of which were sustained and others overruled by the chancellor. With reference to division A, the master reported that thirteen hundred and forty-two trees had been boxed by appellee, sixty-five of which died as a result thereof; that the value of the trees before being boxed was one dollar each; that the damage to the trees by reason of being boxed was fifty cents each; that the value of the products extracted by appellee from the trees was two hundred and twenty-eight dollars after deducting the expense incurred by it in extracting them, and recommended the allowance of each item—that is, one dollar each for the trees killed, fifty cents each for the trees boxed but not killed, and two hundred and twenty-eight dollars value of the products extracted.

The chancellor approved this report as to the first two items, but properly disallowed the two hundred and twenty-eight dollars value of the products extracted. Appellee was liable only for the actual damages sus-

tained by appellant, and he (appellant) had the option of recovering either the full amount of damage, that necessarily as well as that unnecessarily, inflicted upon the trees in the process of extracting the products therefrom; or of recovering these products, or their value, together with the amount of any damage unnecessarily inflicted upon the trees in the process of extraction. If he elects to take the products or their value, he cannot also recover the damage necessarily inflicted upon the trees in the process of extracting these products. Since the trees which were originally worth one dollar each are still worth fifty cents each, when appellant receives fifty cents each for the damage done thereto, it seems to us that he has been made whole. For the same reason, the chancellor properly sustained the exception to the master's allowance of the value of products taken from the trees on division C.

With reference to division C, the master further reported that the trees were boxed and worked for two years under such circumstances as to make appellee a willful trespasser, and he therefore recommended that appellant be awarded punitive damages in the sum of ten cents per year for each tree boxed. The chancellor declined to allow punitive damages for the first year for the reason that, in his opinion, the evidence did not warrant the finding that appellee was a willful trespasser during that year. It is argued by appellant that the report of the master has the same effect as the verdict of a jury, and consequently must be approved if there is competent evidence to support it. This is true, in so far as such a report deals with questions of fact. Whether or not appellee was a willful trespasser in cutting these trees was a question of fact; but when this fact was determined, and it was found to have been a willful trespasser, it did not necessarily follow that punitive damages should have been awarded. "Such damages are allowed not solely, nor chiefly, for the benefit of the par-

ticular individual injured, but are awarded on the well-established principle of law that they may have a deterrent effect and protect the public against the repetition of similar offenses." As the very name implies, "punitive" damages are awarded by way of punishment, and the imposition of this punishment lies as completely in the discretion of the chancellor as it does in the jury in cases tried by a jury. Whether or not this punishment shall be imposed is not a question of fact at all, and consequently the recommendation of the master relative thereto may be followed by the chancellor or not, as in his judgment may seem best under all the circumstances in the case. The chancellor properly approved the recommendation of the master that appellant be allowed nothing for the boxing of the trees on division D. Appellee was a lessee of this land under mesne conveyance from a lease by appellant's grantor, and of which the grantor had actual notice prior to his purchase. Appellant's grantor was a corporation, and the lease executed by it to appellee's remote grantor was not sealed; and while it is true that an unsealed deed executed by a corporation is insufficient to convey the legal title, it does convey the equitable title, which title a court of equity will protect and enforce.

By this instrument the land was leased to the grantee therein for a term of three years from the date of boxing; the grantor reserving the right to designate what timber should be first boxed. The boxing of the timber was not begun until after the expiration of seven years from the date of the lease, and when begun the land had been purchased by appellant. Since the time within which the boxing must be begun is not specified in the lease; appellant contends that the boxing must have been begun within a reasonable time, and that seven years is an unreasonable time in which to begin, and that consequently appellee's right to box the trees had expired when the boxing was begun. On this point I am directed

by my brethren to say that: "The question of the reasonableness or unreasonableness of this contract cannot be drawn in question in this proceeding. When a valid contract is once made for the sale of timber or timber rights which specified no time for the completion of the contract, the court will construe the contract so as to force the completion within a reasonable time, determinable from all the facts and circumstances surrounding each particular case; but the court will not declare any such contract unreasonable so as to avoid the consequences except on a direct proceeding to cancel." In the conclusion reached by my brethren, that the court can only determine the time within which contracts of this character must be performed in a proceeding instituted for the purpose of canceling the instrument, I am unable to concur.

There is no merit in appellee's contention that it was liable only for the rental value of the land. It may be that appellant, had he so desired, could have elected to take the rental value of the land, as to which we express no opinion.

Appellee contends that included in the amount of damages awarded by the chancellor is the sum of four hundred and twenty dollars, the value of products taken from the trees; but we have been unable to verify this claim.

Affirmed.

CLIDE WILLOUGHBY AND IDDO WILLOUGHBY v. B. L. POPE.

[58 South. 705.]

1. HOMESTEAD. *Fraudulent conveyance. Motive of transfer. Fraud. Actions. Evidence. Sufficiency. Crops.*

The owner of an exempt homestead has the right to convey the same and the motives moving him do not in any way affect the title of the grantee.

2. FRAUD. *Evidence. Sufficiency.*

Fraud is not established by raising a mere suspicion.

3. CROPS. *Title. Judgment lien.*

Working a crop does not give the worker title to the crop, and does not subject the product of his labor to the judgment lien of his creditor.

APPEAL from the circuit court of Pike county.

HON. D. M. MILLER, Judge.

Suit by B. L. Pope against D. M. & F. M. Willoughby in which Clide and Iddo Willoughby intervene as claimants. From a judgment for plaintiff, claimants appeal.

The facts are fully stated in the opinion of the court.

Clem V. Ratcliff, for appellant.

We contend that the judgment should be reversed, and judgment entered here for the claimants for the reason that the plaintiff in execution did not show by the testimony that the cotton was subject to the execution and the levy.

We submit that the testimony is entirely insufficient to justify the verdict of the jury and it is contrary to the law. The verdict should have been for the claimants on the facts. We invite a careful reading of the transcript for this particular feature of this brief.

The second instruction for plaintiff is more painful error still, and is squarely in conflict with the whole tes-

timony in the case. That instruction tells the jury the startling law, that although they may believe from the testimony that the conveyance from D. M. & M. F. Willoughby to C. M. & C. J. Willoughby, the claimants, was a *bona fide*, honest transaction, and that the land was the property of claimants, and that the cotton was raised on their land, yet if they believe that D. M. or M. F. Willoughby, or either of them raised the cotton and it was their property at the time of the levy of the execution, that then the jury should find for the plaintiff, Pope. This instruction is incomplete, and inconsistent with the facts proven and contrary to the law. It eliminates from the consideration of the jury all the rights of the landlords as to their liens against the agricultural products of their tenants. The testimony in the case shows, and the instruction admits that the claimants were the *bona fide* landlords, and that the cotton was raised on their land. It then goes on to say if you believe under that condition that the father and mother, D. M. & M. F. Willoughby, or either of them owned the cotton at the time of the levy, etc. . . . Under the instruction and the testimony, D. M. & M. F. Willoughby could not possibly have owned the cotton except they had been the tenants of claimants, and if they were tenants of claimants, then claimants as landlords certainly had a valid, superior and paramount lien for supplies to their tenants for every thing furnished to make the cotton. The proof shows (see testimony of D. M. and Clide and Iddo Willoughby and J. L. Jackson) that claimants, or at least Clide Willoughby, did supply every thing necessary for the making of the cotton from C. Atkinson Sons Co. in Summit. Then of course he had his paramount lien for these supplies which a mere judgment lien cannot defeat. We say therefore that the instruction omitted the qualifying clause allowing to the claimants their legal rights under their landlord's lien. The instruction is clearly and fatally erroneous for this

omission. The testimony abundantly justifies this saving clause in the instruction for the claimants as landlords.

The instruction admits the claimants to be *bona fide*, honest landlords, and that the cotton was raised on their land. Then it, the cotton, could only be D. M. Willoughby's by tenancy of the claimants, and the proof comes in here and says that the claimant furnished the supplies to make the crop of cotton, and the law comes in here and says if this is so, the claimant (landlord) has a paramount lien, and the instruction as written excludes this idea of this fact from the jury and is fatal to a vested, material, and paramount right of claimant.

Cassedy & Butler, for appellee.

It would make no difference whether the land belonged to the boys or not if the old man made the crop. The only question that was presented was as to who made the cotton, and to whom did it belong. The only claim that the boys made was that they raised it. They did not claim that there was any kind of a contract by which the old man was to make it for them. So the question is pure and simple, "who made it?" The old man and Clide testified that Clide made it. As against this we have the testimony of the neighbors, passing there almost daily during the crop season, and old man Willoughby and the little boys, not the claimants, were working the crop, with mules that belonged to him. That Clide was never working the crop, and to the contrary he was going to school part of the time, and working at a sawmill part of the time. When the officer levied on the cotton he found it in the possession of Martin Willoughby, the execution debtor, this alone makes a *prima facie* case under the law. Under these circumstances, can the court say as a matter of law that this evidence was not sufficient to go to the jury, and does not support the verdict? We say it was properly submitted to

the jury, and they have determined that it was the property of the execution debtors, and ought to stand.

Cook, J., delivered the opinion of the court.

B. L. Pope, appellee, obtained a judgment against D. M. and F. M. Willoughby, and had execution levied upon six bales of cotton, which were claimed by Clide and Iddo Willoughby, appellants. The claimants' issue was made up and the case submitted to the jury in the circuit court to which the execution was returnable. The verdict of the jury was for the plaintiff in execution, and claimants appeal to this court.

The defendants in execution were the father and mother of the claimants, and while the original suit was pending for trial, and a short time before the term of court at which the trial was to be had, they conveyed forty acres of land to their sons, Clide and Iddo, which forty acres was a part of their homestead. The six bales of cotton, the subject of contest, were raised on this land. It was claimed that the deed made by their parents to appellants was made for the purpose of defrauding plaintiff in execution, and upon this issue the case was fought out. Although the land conveyed, and upon which the cotton was grown, was conceded to be exempt from execution, yet it was insisted that the old people, in anticipation of the judgment subsequently rendered against them, conveyed this land to their children in order to prevent the judgment creditor from levying an execution upon the products thereof not yet in existence, but which, in all probability, would be planted, cultivated, matured, and severed from the soil.

The contention of plaintiffs is untenable. The owners of the land had a legal right to convey the title to the land, and their creditors had no right to complain in this action. The judgment was not a lien on the homestead; and while the judgment creditors might have secured a right to levy execution on the crops produced on

the homestead after such crops were severed from the soil, nevertheless the debtor and his wife had a perfect right to sell the homestead, even though they did so to prevent the debtor from collecting his claim in this manner. It will not do to say that a conveyance of exempt property is fraudulent and void as to creditors, because the exemptionist anticipated that creditors would be able, at some time in the future, to enforce the collection of their claims out of the increase of the exempt property. The land was exempt, and the motives moving the exemptionists to part with the title do not in any way affect the title of the grantees. To use a common expression, it was none of appellee's business what the Willoughbys did with their homestead.

It was also claimed that the crops were produced by the labor of the father, and consequently he owned the six bales of cotton. This view was not supported by the evidence. Circumstances were given in evidence which might have raised a suspicion; but suspicion does not arise to the dignity of proof. It has grown to be the fashion to view the acts of our fellowmen with suspicion and distrust. According to the tenets of this cynical school of thought, fraud should be presumed wherever fraud is suggested. This transitory mental attitude does not meet with the approval of this court, and, as it appears to us this rule of action was adopted as a rule of law upon the trial of this case, we cannot approve the verdict of the jury upon this branch of the case.

Working the crop does not give the worker title to the crop, and does not subject the product of his labor to the judgment lien of his creditors. So, if the evidence tended to prove the contention of appellee, it does not follow that the jury was authorized to find a verdict in his favor.

For the reasons assigned, the case is reversed and remanded.

*Reversed and remanded.
Suggestion of error filed and overruled.*

ILLINOIS CENTRAL RAILROAD CO. v. E. D. CARRAWAY.

[58 South. 707.]

1. MASTER AND SERVANT. Injuries. Sufficiency of evidence. Discovered peril. Code 1906, Sec. 1985.

In a suit for the death of a car inspector against a railroad company by being run over by a switch engine, where the evidence showed that the switch engine was being preceded by a flagman to whom the engineer looked for signals, and where a witness testified that this flagman saw deceased on the track and must have realized that he was unaware of his danger in ample time to have warned him of the approaching engine, or to have signalled the engineer who then could have stopped the engine before it struck deceased. In such case leaving out of view Code 1906, Sec. 1985, altogether, a peremptory instruction for defendant should not be given.

2. SAME.

In such case even though deceased was guilty of contributory negligence, if the employees of appellant in charge of the train, after discovering his peril, could by the exercise of reasonable care have avoided inflicting injury it was their duty to do so.

APPEAL from the circuit court of Madison county.

HON. W. A. HENRY, Judge.

Suit by Mrs. E. D. Carraway against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals.

For former opinion, see 58 South. 222.

This was an action for damages based upon the alleged negligence of the railroad company in the killing of one W. D. Moore, a brother of appellee. The case was affirmed without written opinion on April 22, 1912. See 58 South. 222. A suggestion of error was afterwards filed by the appellant.

Moore was car inspector at Canton for the railroad company and had served in that capacity for three years

and had been employed by the company in various lines of work for fourteen years. Canton was a relay station at which point crews were changed and cars which had gotten out of order on the run were taken out of the trains and sent into the shops for repair. On the day of the accident a through freight, called a manifest train, was being brought through Canton, the destination being New Orleans. At Canton, Moore after inspecting the train directed a certain car to be taken out of the train and sent to the shops for repair; after this had been done, a new engine was to be attached to the train so that it might proceed to New Orleans.

There are a number of tracks at Canton, and the engine, in charge of engineer Munn, which was to take the manifest train, was standing on a side track called a pocket track when Moore instructed the conductor that he could proceed with his train; thereupon the signal was given to Munn who ran his engine out of the pocket track onto the track where the manifest train was standing, and proceeded to back his engine up to the train in order to couple. As the engine backed up to the train it pushed its tender, which was heaped up with coal so that a view of the track by the engineer and fireman was somewhat obstructed at points close to the tender. As the engine backed northward in order to make the coupling, engineer Munn was at his place on the right hand side of the cab, and the fireman was on the left side of the cab ringing the bell. A brakeman named Gorder preceded the backing tender at a distance variously estimated from twenty to sixty feet. The engine was going at about four miles an hour.

According to the testimony of defendant's witness Gorder, the brakeman, deceased, Moore, was walking along near the track talking to Gorder and stepped on the track at a point too close to the tender for him to be seen by the engineer or fireman, both of whom testified that they were on the lookout. Two or three per-

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Statement of the case.

sons saw his peril and shouted a warning, but a switch engine was standing on an adjoining track and the escaping steam was making some noise. At any rate, Moore seems not to have heard the warning, and the backing tender struck him and threw him to the ground and one wheel of the tender passed over his head killing him instantly. Among others who saw Moore's dangerous position was a switchman named Ward who says that he tried to signal the brakeman, Gorder, and the fireman, but could attract the attention of neither of them. The fireman testified that, when he saw that some one was evidently in peril, he called, "Look out," and the engineer immediately put on his emergency brake and stopped the engine in about four feet but too late to prevent the accident.

There is very little conflict in the testimony. It is disputed just when Moore did step upon the track, whether immediately before he was struck, or whether he was walking down the track for some time before being struck. Plaintiff's witnesses also deny that the fireman was looking back toward the train to which his engine was to be coupled, and for that reason could not be warned by those who saw the peril of deceased in time to prevent the accident. Plaintiff also takes the position that the brakeman, Gorder, who was to make the coupling and who must have known of the approach of the backing engine, should have warned deceased of his peril, and, had he taken the proper precautions, the accident would have been prevented. The brakeman, Gorder, testified that he met deceased, Moore, between the tracks and stopped and asked him if everything was all right, and just as he did this he heard some one shout, "Look out," and he looked around and saw the wheel passing over deceased; that he was walking about twenty feet ahead of the backing engine; that he was on the engineer's side of the track and that Moore was on the fireman's side, and that Moore faced toward him

when they spoke; that Moore was not in any danger at that time and that he did not see him step on the track. Witness Ward, however, testified that deceased was walking down the track some distance conversing with Gorder when he was struck. Ward's testimony is in substance as follows: "The last time I saw him, just a few minutes before he was killed, he was coming across from track No. 2 over towards No. 3 track and was walking up between track No. 3 talking to Gorder. No. 51 (the manifest train) was made up on No. 3 track and I had crossed over to No. 2 track. I looked up and saw him still coming up No. 3 track talking to Gorder. He was in the middle of the track then, and I saw 51's engine backing into the train, and our engine (the switch engine) was standing in No. 2's track. I saw he didn't see this engine backing up, and I hollered to him; at that time 51's engine was about 60 feet from him. He didn't pay any attention and I hollered again—several times, and finally, I don't know whether my hollering attracted his attention or not, he was still talking to Gorder—he turned around facing east and when he did 51's engine hit him and he stumbled for several steps and caught one of his feet in the brake rigging and it turned him completely around and he fell with his head across the rail."

Defendant asked for a peremptory instruction on the ground that the facts failed to show any negligence on the part of the employees of the railroad company, and the further ground that the plaintiff was guilty of contributory negligence and that he had placed himself in this dangerous position without taking the proper precautions.

The defendant also contends that section 1985 of the Code has no application. Said section is as follows: "In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall

be *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employees of railroad companies.”

The court refused the peremptory instruction, and the case went to the jury who returned a verdict for plaintiff for five thousand dollars, from which this appeal is taken.

Mayes & Longstreet, for appellant.

Taking the view of the plaintiff's witnesses themselves, they claim that the deceased was walking up the track and that Gorder was diverting his attention by talking to him. Conceding for the argument that somewhere along the line the railroad company is blamable as in the case of negligence, the plaintiff is not entitled to recover because of the manifest contributory negligence of the deceased.

The undisputed evidence in this case shows that he was perfectly familiar with the yards, having been engaged in his existing duty for years in those yards. He was at the time in control of the train.

Granting that he was walking up the track, he was in a place where he had no business to be. He was in a place where it was not necessary for him to be, for he could just as well have walked up between the tracks in a place of perfect safety, as the witness Gorder did, without dispute. Unquestionably he was in a general way directing what was being done.

The theory of the plaintiff was that he was walking up to the train in order to inspect the air when the coupling was done. He knew, unquestionably, that the coupling was about to be made. He had released the engine and tender from the pocket track in order that it might back up and couple on. It was his business to be on the lookout, but instead of doing so, he deliberately got on the track and walked up the track in such a careless way

that this engine which was running at a rate of less than five miles an hour, he permitted to run over him. If he engaged in conversation with Gorder, it was his own act. Gorder was nothing but a flagman; he had no power to compel this inspector to talk to him or to demand the inspector's attention. The uncontradicted evidence in the case, and this is even the evidence of the witness, Mr. Ward, was that whether the deceased was between the tracks or on the track, it still was true that his face was turned to one side, toward the west side, and his head was in such a position that he had nothing to do but to turn his eyes to the left to see this approaching engine and tender.

The uncontradicted evidence is that if he had observed it, as he ought to have done, he had nothing to do but to step four or five feet, two steps, to take him into a place of entire safety at any time before the actual impact.

Under these circumstances, we claim that his contributory negligence is perfectly clear, and the peremptory instruction should have been granted on that ground.

• *Morehead v. Railroad Co.*, 84 Miss. 112; *Railroad Co. v. Latiker*, 53 South. 955; *Railroad Co. v. Maseley*, 57 Fed. 926; *Aerkfetz v. Humphreys*, 145 U. S. 418; *Railway Co. v. Stick*, 143 Ind. 449.

H. B. Greaves, for appellee.

• I would submit this case without briefs, since such cases as this have been so often before this court and so repeatedly considered that no authority is needed to refresh this court's mind. Without commenting on them, I append a few recent opinions I have read from this court, which mean nothing if we are to lose this case, some of which I have before cited.

The question of negligence under the surrounding circumstances is for the jury: *Stephens v. Railroad Co.*, 81 Miss. 195, opinion by Calhoun, J.; *Allen v. Railroad Co.*, 88 Miss. 25, opinion by Mayes, J; *Railroad Co. v.*

Humphreys, 83 Miss. 721, opinion by Truly, J; *Hopson v. K. C. Railroad Co.*, 87 Miss. 789, opinion by Calhoun, J; *Railroad Co. v. Landrum*, 89 Miss. 399, opinion by Whitfield, J; *Railway Co. v. Murray*, 91 Miss. 546, opinion by Calhoun, J; *Railway Co. v. Brooks*, 85 Miss. 269, opinion by Truly, J; *Cumberland Telephone & Telegraph Co. v. Anderson*, 89 Miss. 732, opinion by Whitfield, C. J.; *Railroad Co. v. Bethea*, 88 Miss. 119, opinion by Truly, J.

“So many questions are integrated usually into the solution of the question of negligence, it is so necessary to carefully examine all the circumstances making up the situation in each case that it must be a rare case of negligence which the court should take from the jury,” is the language used by the court in *Bell v. Railroad Co.*, 87 Miss. 234, opinion by Whitfield, C. J. This expression has been quoted and approved in a number of cases; see *Railroad Co. v. Wallace*, 91 Miss. 496, opinion by Whitfield, C. J; *Allen v. Railway Co.*, 88 Miss. 30, opinion by Mayes, J; *Jennie Owens v. Railway Co.*, 94 Miss. 387, opinion by Whitfield, C. J; *Hopson v. Railway Co.*, 87 Miss. 800, opinion by Calhoun, J; *Railway Co. v. Crominarity*, 86 Miss. 468, opinion by Truly, J.

It is perfectly manifest that the action of the negro fireman and engineer in backing up this train without keeping any sort of lookout, as they should have done, whereby Mr. Ward was unable to get the attention of either in order to signal them to stop, the fuss and noise from other engines and trains making it impossible to hear or to be heard, amounted to gross and wilful negligence, against which mere contributory negligence is no defense.

The twelve men that tried this case said deceased, under the circumstances shown in evidence was not negligent. It was for them to say. *Railroad Co. v. Rivers*, 93 Miss. 565; *Railway Co. v. Brown*, 77 Miss. 338, opinion by Woods, C. J. See last paragraph of opinion and

cited approved in *Railroad Co. v. Block*, 86 Miss. 426, opinion by Cox, J.; *Stevens v. Railway Co.*, 81 Miss. part of opinion at bottom of page 207; *Electric Railway Co. v. Carnahan*, 48 South. 617, opinion by Fletcher, J., and Whitfield, C. J.; *Magee v. Railway Co.*, 48 South. 724, opinion by Mayes, J.

This is not a case of deceased's own "voluntary, deliberate, wilful, reckless, exposure," being the language used by Calhoun, J., in *Sledge v. Railway Co.*, 87 Miss. opinion page 570, and *Railway Co. v. Schraag*, 84 Miss. 125 and *Morehead v. Railway Co.*, 84 Miss. 123, are not applicable to this case. Here it is shown that neither the engineer nor fireman were on the lookout, and if they had been deceased would not have been killed. *Pullum v. Railway Co.*, 75 Miss. 634 and *Railroad Co. v. Ruff*, 95 Miss. 165, are not applicable to this case as this case is not one of those "rare cases of negligence a court ought to take from the jury." We must take into consideration the surroundings of the deceased, in a railroad yard surrounded by moving cars, puffing engines and a multitude of bewildering noises, a place where those in charge of backing trains should take nothing for granted but be at their place of duty on the lookout.

SMITH, J., delivered the opinion of the court.

Leaving altogether out of view Sec. 1985 of the Code of 1906, still the peremptory instruction requested by appellant was properly refused.

At the time the engine struck deceased it was being preceded by a flagman to whom the engineer looked for signals and, according to the evidence of Ward, a witness for appellee, the truth of which was for the jury and not the court, this flagman saw deceased on the track and must have realized that he was unaware of his danger in ample time to have warned him of the approaching engine or to have signaled the engineer who then could have stopped the engine before it struck deceased.

Granting that deceased was guilty of contributory negligence as to which we express no opinion, if the employees of appellant in charge of the train, after discovering his peril, could by the exercise of reasonable care have avoided inflicting the injury, it was their duty so to do.

Affirmed.

Suggestion of error overruled.

MAYES, C. J. (dissenting).

In the first consideration of this case by the court I consented to its affirmance with grave doubt as to the correctness of the court's view at that time. A careful re-examination of the record convinces me that the court was in error. Under the facts of this case, as they appear to me, this court cannot affirm unless it is to say that in all cases of injury by the running of the train, no matter how the injury happens, there is liability on the part of a railroad company. The testimony in my judgment utterly fails to show any negligent act on the part of the railroad company. Nothing that the company did or left undone could have prevented this injury.

Considering the case from any standpoint the testimony warrants, it shows a clear case of gross neglect on the part of the party injured to take ordinary precaution to provide for his own safety. His injury was the direct result of his own negligence.

Section 1985 has no application to the case because the facts surrounding the injury are fully developed. The testimony offered by the railroad company shows that it was guilty of no negligence, and the testimony offered by the appellee clearly shows that the injured party was guilty of contributory negligence. I have no fault to find with the abstract law announced in the majority opinion, but it is my judgment that the facts make no case for the application of this principle.

DR. CHAS. GALLOWAY v. Z. T. CHAMPLIN.

[58 South. 710.]

APPEAL FROM JUSTICE OF PEACE. *Damages. Code 1906, Sec. 86.*

Sec. 86 of the Code of 1906 providing that if on appeal from a judgment of a justice of the peace by defendant judgment be rendered for plaintiff for a sum equal to or greater than the amount recovered before the justice of the peace, ten per cent damages shall be added to the judgment by the circuit court, has no application to an appeal of a defeated plaintiff, but refers to a defendant who appeals from the judgment of a justice of the peace and fails to make good in the circuit court.

APPEAL from the circuit court of Harrison county.

HON. T. H. BARRETT, Judge.

Suit by Z. T. Champlin against Dr. Chas. Galloway.
From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

J. L. Taylor, for appellant.

The verdict was excessive for that the most that could have been recovered under any event was the principal and interest from maturity at six per cent, amounting to only one hundred and eighty dollars and he could not claim ten per cent statutory penalty on appeal from the justice court for that J. C. Wilmoth lost the suit in the justice court and took the appeal himself.

M. D. Brown, for appellee.

No brief of counsel for appellee in the record.

Cook, J., delivered the opinion of the court.

There is no error in the rulings and judgment of the trial court upon the merits of this case; but the case must be reversed, unless a remittitur is entered in this court.

This was an action on a promissory note, begun in the court of a justice of the peace. The plaintiff in that court was defeated, and therefore recovered nothing, whereupon he appealed to the circuit court. The circuit court rendered a judgment for the plaintiff for the amount of his claim plus ten per cent. damages. This was an error, as Sec. 86 of the Code of 1906 has no application to an appeal of a defeated plaintiff, but refers to a defendant, who appeals from the judgment of a justice of the peace and fails to make good in the circuit court.

Affirmed with remittitur.

W. H. POTTER ET AL. v. FIDELITY & DEPOSIT Co. OF
MARYLAND.

[58 South. 713.]

1. PRIORITY OF STATE AS CREDITOR. *Statutes in derogation of sovereignty. Construction. Depositaries. Code 1906, Sec. 3485. Laws 1908, Ch. 96. Subrogation. Right of Surety.*

In the absence of statutory or constitutional authority, the state, as sovereign, has no preferential rights in this state.

2. STATUTE IN DEROGATION OF SOVEREIGNTY. *Construction.*

When the state's sovereignty is involved in any statute, statutes in derogation thereof are to be strictly construed in favor of the state, but the state sovereignty is not involved where the question is one of priority merely.

3. DEPOSITARIES. *Statutes in derogation of common right. Code 1906, Sec. 3485.*

Code 1906, Sec. 3485 giving priority to the state over general creditors is a statute in derogation of common right, and such statutes are to be strictly construed as against parties, asserting claims by virtue of such statutes.

4. PRIORITY OF STATE AS CREDITOR. *Code* 1906, *Sec.* 3485. *Laws* 1908, *Ch.* 96.

Sec. 3485, Code of 1906, was not repealed or intended to be repealed by Ch. 96 of Laws of 1908. It still stands as security to the state for all deposits of its money made by any person, in case of the insolvency of the institution where the deposit is made in all cases where any deposit is not made by virtue of its authority under the depository law of 1908. But when the state itself disposes of its public funds as is required by its depository laws, the relation of debtor and creditor is established between the state and the depository, merely, and the state must make its money, in the event of the insolvency of the depository out of its securities, and failing in this must share the assets pro rata with the other creditors.

5. SAME.

When funds are placed by the state in a depository as provided by Laws 1908, Ch. 96, they are not "trust funds" within any meaning or purpose provided for by Sec. 3485, Code of 1906.

6. SAME.

Where a bank selected as a state depository afterwards became insolvent and went into the hands of a receiver and the surety of such bank paid to the state the money owed by the bank and afterwards sued the receiver of the bank, to establish a right of subrogation to the state's alleged right of priority over the general creditors, such surety had no right of subrogation to priority over general creditors because the state itself had no such right.

APPEAL from the chancery court of Hinds county.

HON. G. G. LYELL, Chancellor.

Suit by the Fidelity & Deposit Company of Maryland against W. H. Potter and another, receiver of the Mississippi Bank & Trust Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Green & Green and *F. M. West* and *W. R. Harper* and *Willing & Davis* and *Harris & Potter*, for appellant.

Watkins & Watkins, for appellee.

Counsel on both sides filed very able and extended briefs but too long for publication.

MAYES, C. J., delivered the opinion of the court.

This controversy arises under the state depository law, and the question involved is easily stated. In 1908 the legislature enacted a law providing for the establishment of state depositories. See Ch. 96, p. 77, Laws of 1908. Sec. 2, Ch. 96, of the Laws of 1908, was amended by Ch. 224, p. 223, of the Laws of 1910; but the amendment made has no bearing on the questions involved here. We shall not set out the legislative act in this opinion, since it will be easily accessible to the reader. This law creating state depositories was new in our jurisprudence at the time of the passage of the act, and by it a new method of dealing with public funds was initiated.

The record in this case discloses that the Mississippi Bank & Trust Company was selected as a state depository in accordance with every requirement of the law, and tendered as its security the surety bond of the Fidelity & Deposit Company in the sum of something over twenty thousand dollars. The surety company authorizing the use of its surety bond by the Mississippi Bank & Trust Company fulfilled all the requirements of the law as to its right to become surety to a selected depository. It may not be amiss to state at this juncture that no question is raised as to any irregularity in any of the procedure leading up to the selection and establishment of the Mississippi Bank & Trust Company as a state depository, nor is any point made by appellee as to the liability incurred by it to the state on the bond which it gave as surety for the deposits placed by the state in the Mississippi Bank & Trust Company. The whole question in this case is upon the right of the appellee to be subrogated to an alleged priority which it claims that the state has in the assets of the bank over the general creditors.

It appears that some time in July, 1911, the Mississippi Bank & Trust Company became insolvent while

it was acting as a depository and while appellee's surety bond was in full force, and, upon the application of creditors, was placed in the hands of a receiver. At the time this was done it was indebted to the state some twenty thousand dollars. The appellee, the Fidelity & Deposit Company, paid the full amount of the state's claim and filed a petition in the chancery court, seeking to be subrogated to an alleged priority which it claims the state has on the assets of the bank over all general creditors. The chancellor sustained the contention and allowed the claim as a preference claim, and from this judgment the receivers prosecute an appeal.

The contention is that the state's debt constituted a trust fund, and because the appellee company paid the state's claim it has the right to be subrogated to the state's right. In discussing this case we may state that, if the state has any priority over the general creditors, it must obtain it by virtue of some statute of the state or constitutional provision. In the absence of statutory or constitutional authority, the state, as sovereign, has no preferential rights in this state. This was settled as the law of this state when the case of *Shields v. Thomas*, 71 Miss. 260, 14 South. 84, 42 Am. St. Rep. 458, was decided. But if the court had not already set at rest this question, we would have no hesitancy in now declaring this to be the law. Some courts have held the reverse of this (see *Booth v. State of Georgia*, 131 Ga. 750, 63 S. E. 502, and note in 36 Cyc. p. 871), but we adopt the authorities which deny the state priority on any idea of sovereignty. For a discussion of this subject, see text and authorities cited thereto in 36 Cyc. 871.

Since the state has no sovereign right to priority, if it has any such right under the laws of this state, it must obtain that right under Sec. 3485 of the Code of 1906, or by virtue of the depository law of 1908, for these are the only two places in the law of the state where the

method of dealing with the public funds is regulated. We will discuss these statutes separately.

Sec. 3485 of the Code of 1906 is as follows: "All money deposited in bank, or with any other depository, by or for a tax collector, or other officer having the custody of public funds, state, county, municipal, or levee board, whether the same be deposited in the name of the officer as an individual or as any officer, or in the name of any other person, is *prima facie* public money and a trust fund, and is not liable to be taken by the general creditors of the officer or by the creditors of the depository." If this section has any control over the law of this case, and if the state has any priority by virtue of this or any other statute of the state, then under the cases of *Fogg v. Bank*, 80 Miss. 750, 32 South. 285, *Metcalf v. Bank*, 89 Miss. 649, 41 South. 377, *Bank v. Hardy*, 97 Miss. 755, 53 South. 395, and *Green v. Cole*, 98 Miss. 67, 54 South. 65, the right of appellee to be subrogated to that priority is beyond question.

But the question in this case at this point is whether or not Sec. 3485 of the Code has any bearing on the question involved. In construing this statute, let us consider for a moment the rules of construction that are to be applied. When the state's sovereignty is involved in any statute, statutes in derogation thereof are to be strictly construed in favor of the state; that is to say, the state's sovereignty is to be broadened and upheld, and not narrowed or destroyed, when the courts are called upon to construe a statute infringing upon sovereign power. But we have held that the state's sovereignty is not involved where the question is one of priority merely. The state stands in the same position, in questions of this character, as does the humblest citizen, unless the Constitution or laws give it a priority over general creditors. If this be true, then this statute giving this priority to the state over general creditors is a statute in derogation of common right, and such statutes

are to be strictly construed as against parties asserting claims by virtue of such statutes. They are to be so construed as to bring within their scope only such rights as are plainly within the terms. Such we conceive to be the rule by which this statute is to be construed.

Sec. 3485 of the Code was enacted long before the depository law of 1908, and was designed to protect the state in a wholly different matter from anything dealt with by the law of 1908. Let us for a moment compare these two laws. Sec. 3485 of the Code does not give authority to any person to make a deposit of public funds. Chapter 96 of the Laws of 1908 has this as its main purpose. If a deposit was made under section 3485, the person making the deposit acted upon his own initiative and on his own idea as to the solvency or insolvency of the place of deposit. The sovereign was no party to the making of the deposit and did not acquiesce in it. Section 3485 merely relieved the person depositing the funds from criminal liability at the utmost. It certainly did not confer authority to make the deposit. Under section 3485 no person had any authority to loan the fund. No authority was given to demand security. The person used his own discretion as to the safety of the bank. He was not authorized to collect interest or consent to the bank using the fund deposited as a part of its assets. The fund had never been paid over to the sovereign authority, and it had not assumed control of it. It was merely in transit to its owner, held by the agents awaiting the time to pay it over. Under these circumstances, and to cover these cases, for the protection of itself, the legislature enacted section 3485, providing that these funds, when so deposited without the knowledge or consent of the state, should be "trust funds," and not liable to be taken by general creditors.

The law of 1908, in intent and purpose, is the reverse of Sec. 3485 of the Code in every particular, and intended to cover a different state of affairs. It is complete in

itself, and furnishes its own measure of legal right. Both laws accomplish an important, but altogether different, purpose. Neither has any bearing on the other, and both may operate at the same time without any conflict. Section 3485 was not repealed, or intended to be repealed, by the laws of 1908. Section 3485 still stands as security to the state for all deposits of its money made by any person, in case of the insolvency of the institution where the deposit is made, in all cases where any deposit is not made by virtue of its authority as evidenced by the depository law of 1908. But when the state itself disposes of its public funds as is required by the depository laws, the relation of debtor and creditor is established between the state and the depository merely, and the state must make its money, in the event of the insolvency of the depository, out of its securities, and, failing in this, it must take its place in the line of general creditors and share the assets pro rata with such creditors. When the funds are placed by the state in the depository, they are not "trust funds" within any meaning or purpose provided for by Sec. 3485 of the Code. Every deposit made by every person with any bank is in a sense a "trust fund," and it is only in this sense that the deposits made by the state are such, and in this sense no priority is given to one depositor over another. The argument of counsel for appellee resolves itself into the proposition that, unless section 3485 covered this deposit, there was no other law that did. But, if we were wrong in this statement, the law is searched in vain in an attempt to find any other statute of the state that hints at any priority of the state as to the deposit of public funds.

Let us examine Ch. 96 of the Laws of 1908 for a moment. The act is new to the law and complete in itself. It nowhere declares that the funds deposited in accordance with its provisions shall be deemed "trust funds." The deposit is made by the sovereign power itself for

the purpose of gain, with the intent that the funds shall be used by the depositories as any other general fund. The act clearly intends that the fund deposited shall become assets of the bank, and used by it, and commingled with its other funds, just as would any sum of money borrowed from any source. The act fixes the security and provides for the careful selection of its depositories. The manner of dealing with these public funds as authorized by the law of 1908 is antagonistic to every idea of a trust fund.

We have examined this case and all authorities cited with very great care. It would be profitless for us to take up and discuss the various citations, for we think that an analysis of them all will show that this opinion is in accord with the general holding of all the courts save one or two that assert priority in the state merely because of sovereignty. Other laws of our own state dealing with other public funds and directing the placing of those funds in depositories are called to our attention, but we cannot see any different light that is shed by them on the questions in this case.

It follows from what we have said that appellee has no right of subrogation, because no priority existed in the state; and this cause must be reversed, and petition dismissed.

*Reversed and dismissed.
Suggestion of error filed and overruled.*

MRS. MARY PATTERSON BY NEXT FRIEND v. MRS. FANNIE
M. HUMPHRIES, EXR.

[58 South. 772.]

WILLS. Trust. Construction. Precatory Trust. Mandatory Trust.

Where the will of a testator by the first item left all of his property to his wife for her natural life, subject to the limitations and charges thereafter set out, and by the second item provided that should the income of the estate permit, of which he constituted his executrix the judge, he desired aid extended any member of his family who may be overtaken by adversity, and by the fourth item provided that should a certain daughter become dependent and in need, he charged his wife who was executrix out of the body of his estate to extend to her such aid, as the income, in justice to herself and the other dependent members of the family, enables her to do but not to exceed the sum of three hundred dollars per annum. *Held*, that the words employed in item two were precatory and the discretion was given the executrix to extend aid to the class mentioned if she deemed it wise to do so; but that the provision for his daughter in item four was mandatory and might in case of her necessity be enforced out of the corpus of the estate.

APPEAL from the chancery court of Lowndes county.
HON. J. F. MCCOOL, Chancellor.

Suit by Mrs. H. Patterson by her next friend against Mrs. Fannie M. Humphries as executrix of the will of W. W. Humphries deceased. From a decree sustaining a demurrer to the bill, complainant appeals.

Complainant seeks to fix a charge upon the estate of her deceased father, W. W. Humphries, for the payment to her annually of three hundred dollars, and asking a construction of the will of her said father, which is set out in full below:

“State of Mississippi, Lowndes County.

“I, W. W. Humphries, of the above county and state, hereby make, the following as my last will and testament;

“Item First—After payment of my just debts, I give and bequeath to my beloved wife all of my property, both real and personal, for her natural life, subject to the limitations and charges hereinafter fixed.

“Item Two—I direct that my executrix keep my estate together for her support and the support and education of the younger and unmarried, dependent members of my family, particularly the younger, who by reason of their youth and inexperience are less capable of earning a livelihood. Should the income of the estate permit, of which I constitute my executrix the judge, I desire aid extended any member of my family who may be overtaken by adversity.

“Item Third—I direct that my family residence to be kept up and maintained out of the body of my estate as a home for those mentioned in item second, for at least twenty-one years after my death, and so long thereafter as my wife lives and desires to occupy the same as a homestead. Should my said wife deem it desirable or expedient to sell lots on either side of the residence by way of advancement to any of my children, or to give them building lots, she is fully empowered to make proper deeds.

“Item Fourth—Should my daughter, Mrs. Mary Patterson, become dependent and in need, I charge my wife out of the body of my estate to extend her such aid, as the income, in justice to herself and the other dependent members of my family, enables her to do, but not to exceed the sum of three hundred dollars (\$300.00) per annum, payable in such sums and at such times as may be the most convenient, but said payment to cease when the necessity for it no longer exists.

“Item Fifth—Upon the final division of my estate, that is to say after the lapse of twenty-one years, and the death of my wife, I give to my two youngest children, Edward M., and Fanny Moore Humphries, all of my residence property, that is to say, the residence and

square upon which the same is located in fee simple, as also all of the furniture therein, which I own, most of which however, belongs to their mother.

“All of my other property, both real and personal, I give share and share alike to my other children, save to my daughter Mrs. Mary Patterson, to whom I have advanced what I consider equal to one thousand dollars, and charge her by way of advancement with that amount.

“Item Sixth—My life policy will more than pay my debts. The residue I give to my beloved wife, as also any excess of income arising from estate after paying the charges herein before fixed upon it.

“Item Seven—Should my executrix elect to give by way of advancement to any one of my children a building lot on the square given to Edward M. and Fannie Moore Humphries, then and in that event, I desire a charge placed and fixed upon the share of such child or children as will fairly indemnify the two younger ones and secure to them prompt payment upon the division of the estate.

“Item Eight—Should any unlooked for necessity or emergency arise for the sale of any portion of my estate, my executrix hereinafter named is hereby clothed with full power, to execute the proper deed or bill of sale.

“Item Nine—In the event, any of my children become dissipated, disrespectful or disagreeable at home, I expressly desire that they absent themselves from the family circle until such habits and manners are thoroughly reformed, and with the view of preserving the sanctity of my home, I urge upon and clothe my executrix with the authority to enforce the above injunction.

“Item Ten—I appoint my good and much beloved wife as guardian of my children, and as executrix of this my last will and testament, and expressly direct that she shall not be required to give in either capacity any bond or security or to make any inventory of my estate, or make any report to the chancery court, as to her ex-

Statement of the case.

[101 Miss.]

penditures, or the management of my estate. The simple probate of this will, and the statutory notice to creditors to probate their claims, is all that is necessary, or that I wish done.

“Item Eleven—If my younger boys and daughter prove to be studious and sober, and evince a disposition to receive a classical education, I urge my executrix to regulate family expenditures to this end. I enjoin upon all of my boys to aid each other in becoming good men, to aid their mother in every way they can. I commend her and their sisters to their solicitude and manly affection. Confidence in the Christian integrity and affection of my wife causes me to know that this trust will be faithfully executed.

“This is in my handwriting, upon pages one, two, three and four, with my name endorsed upon the margin of each page and hereto subscribed this the 26th day of January, A. D. 1899.

“W. W. Humphries.”

Codicil:

“Columbus, Miss., Jany. 21, 1903.

‘I insert in the fifth line of Item III (after the words ‘after my death’), until the marriage of my youngest child. My daughter, Mrs. Mary Patterson, having returned some of the articles she is charged with, I only charge her with \$500.00 instead of (\$1,000.00) one thousand dollars and wish her to pay no interest on same.

“W. W. Humphries.

“January 21, 1903.

“Until my boys marry, I wish them to retain their rooms in the family home.

“W. W. Humphries.”

Codicil:

“Columbus, Miss., December 14, 1903.

“Upon the sale of my plantation (out of the proceeds) I desire my son Henry H, to receive one thousand dollars, in excess of my other children. In the event of my

wife's death, I desire my son Henry and kinsman E. T. Moore and C. W. Evans to manage my estate.

“W. W. Humphries.”

J. A. Orr, for appellant.

The question involved is whether Humphries' will is precatory or mandatory. Is it the duty of the executrix, now that the daughter has become destitute and reduced to absolute poverty, to contribute the three hundred dollars contemplated by the father, or has the widow the discretion to gratify her selfishness and withhold from this once favorite child of the father, the sheerest necessities of life?

The attention of the court is particularly directed to the fourth item of will, which will be found on page five of the record. The second item of the will is general in its terms and applies to all the different members of his family. That general provision may be susceptible of a different construction to that which must be placed upon the fourth item as we insist.

I insist that the fourth item in its terms is mandatory and whenever the condition of the daughter has been so reduced to want and poverty as presented in the bill, it becomes the imperative duty of the executrix to contribute the three hundred dollars annually.

I have thus presented to the court briefly my case. It is not necessary to multiply words to this learned court and will content myself by citing a few authorities. See Am. Dig., 1890, p. 3871, Sec. T., No. 266. This is the digest published by the West Publishing Co. for 1890.

The attention of the court is also specially called to the case of *Lucas v. Lockhart et al.* 10 Smedes & Marshall, 471, 18 Atl. 102.

Sturdivant, Owen & Garnett, for appellee.

Unquestionably it was the desire of the testator, W. W. Humphries, to entrust to his wife the management

of his entire estate and that she should carry out his wishes as best she could, and in her discretion, and free from the control of any court, and to hold to the contrary would be as said above to "violate instead of carry out the intent of the parties."

In *Burnes v. Burnes*, 137 Fed. 781, 70 C. C. A. 357, the court says: "The test of a precatory trust is the clear intent of the testator to imperatively control the conduct of the party to whom the language of the will is addressed, by the expression of the desire, and not to commit to his discretion the exercise of the option to comply or refuse to comply with the suggestion made."

In the case at bar it is clear that this amount was not to be paid to appellant, unless in the discretion of the executrix the income from the estate justified it, as the first provision was for the widow and the younger and dependent members of the household, and for the maintenance of the home for all of the class mentioned in the will. It was necessary in making provisions of this kind that would conflict possibly one with the other that confidence in the discretion of some one to manage it should be placed; and it is clear that it has been placed in the widow and to be exercised by her as she thought best for all the various children.

In *McDuffee v. Montgomery*, 128 Fed. 105, the court says: "The will of a testator gave his residuary estate to his wife absolutely, with a request that at her death, or before, if she should think best, she give to his son a certain sum or any sum she might think best. The will then provided: "I further request that she, my said wife, shall assist any of my brothers or sisters if they should be in need, and at her decease she should divide her property among them as she may think best." Held, that the will gave the wife an absolute estate in the property, and did not create a precatory trust in favor of the testator's brothers and sisters."

In the case of *Van Gorder v. Smith*, 99 Ind. 404, the court says: "Where a testator declared in his will that

it was his desire that his wife use certain moneys to provide a comfortable home for his two sons and herself, and might from time to time as she may deem proper and just, divide the property bequeathed to her among the children after first becoming satisfied that it would not be squandered, such precatory words were nothing more than recommendations that she should use and dispose of the property discreetly as her judgment might dictate for her own and the benefit of her sons, and did not create a trust.”

The case of *Rector et al. v. Alcorn et al.*, 88 Miss. 788, 41 South. 370, is instructive in that case as in the one at bar; the testator expressed confidence in his wife to deal justly with his children, and this evidence of the fact that he wished every thing left to the sound discretion of his wife.

In the case of *Post v. Moore*, 73 N. E. 482, 181 N. Y. 15, 106 Am. St. Rep. 496, testator bequeathed all of his property to his wife and her heirs and assigns, and appointed her sole executrix. A separate clause of the will stated that it was testator’s wish and desire that his wife pay three hundred dollars a year to his sister. Held not to create or charge such a trust upon the estate as will support an action by the sister to enforce it.”

The notes in the 106 Am. St. Rep. 522, *et seq.* shed much light upon precatory trusts; the question always is, Did the testator intend to leave to the discretion of the devisee whether or not the amount was to be paid?

In the case at bar it is clear that the aid to be extended to Mrs. Patterson was contingent upon there being sufficient to provide for the first objects of the will, the support of the widow, the support and education of the young and dependent members of his family, and the maintenance of the home for the same; and clearly all this was to be left to the wife in her good judgment and discretion, to manage all for the best interest of the members of the family, and without the control of the courts.

We submit that the testator in this case left this property to his wife for life, for her support and the care of the younger and more dependent children, with full confidence in that wife, and the courts will let that discretion remain where the testator placed it in the widow.

Cook, J., delivered the opinion of the court.

Appellant filed a bill in the chancery court of Lowndes county asking a construction of her father's will. The appellee, Mrs. Fannie M. Humphries, was made executrix of the will, and by the terms of the will she was devised a life interest in the entire estate of the testator, her husband, "subject to the limitations hereinafter fixed." Appellant was the daughter of the testator by a former marriage, was married, and residing in the state of Maryland at the time of testator's death. Appellant, who was complainant below, charged in her bill that item fourth of her father's will was mandatory, and should be construed to mean that she was entitled to a legacy of three hundred dollars per annum, dependent alone upon her becoming "dependent and in need." The bill charges that "her condition in life for years has been one of want, poverty, and dependence, coupled with an incurable disease and intense physical suffering; that since the death of her father she has been continuously in need of money, and that she is now financially embarrassed;" and further, that she has never received one dollar from her father's estate. She further says that her husband had some years ago suffered an almost fatal injury, and in consequence he is unable to support her. From the allegations of the bill it appears that the estate was very valuable, consisting of fertile and valuable plantations, money, and handsome city property. To this bill a demurrer was interposed, assigning one ground why the executrix should not be required to answer, viz.: "There is no equity on the face of the bill. Said bill does not charge any facts entitling complainant to relief."

Item fourth of the will reads as follows: "Should my daughter, Mrs. Mary Patterson, become dependent and in need, I charge my wife out of the body of my estate to extend her such aid as the income, in justice to herself and the other dependent members of my family, enables her to do, but not to exceed three hundred dollars (\$300.00)'per annum, payable in such sums and at such times as may be most convenient, but said payments to cease when the necessity no longer exists." Of course, the allegations of the bill must be taken and considered as literally true, and, when so considered, do the facts stated and admitted entitle complainant to any relief?

The complainant was not a member of the father's household at the time of his death, or at the time the will was written. She, having married, was residing in Maryland with her husband, and, so far as the allegations of the bill disclose the facts; she was in good health and living in comfort when the will was written. As she sues by next friend, we are permitted to infer that she was a minor at the time the bill was filed, although the bill does not so state. The executrix of the will, and owner for life of the entire estate, was not the mother of complainant, but had a family of her own. The family mansion—for mansion it was, according to the bill—is occupied by the executrix and her family, and they are enjoying the income and usufruct of a valuable and productive estate. On the other hand, the only and beloved daughter of her father, the pledge of another and earlier love, is far away in Maryland, incumbered with the care and sorrow of a crippled husband, herself suffering from an incurable disease, and her body racked by the pangs of physical pain. The gaunt wolf of poverty stands at the door of this young woman, the daughter of a distinguished lawyer, who, in his last will and testament "charged" his executrix "out of the body of my estate" to extend to her a helping hand whenever misfortune, poverty, and dependence should overtake her. Has the

time arrived when aid is needed, when even the grudging hand of stinted charity would recognize a deserving case?

Certainly it was not, and is not, contended that the conditions provided for by the will are not present. Then why should not a court of conscience require an answer to this bill? The reasons are given by the brief and argument of counsel for appellee, and may be reduced to one theory, i. e., the will leaves to the executrix the sole discretion of determining when the income of the estate runs beyond the needs of herself and the younger members of the family. Upon her judgment of the needs of herself and family the needy and afflicted daughter must depend, and when the executrix decides that question adversely to the appellant, it was the intention of the testator that no court should have the power to review her decision, no matter how unjust and how unwise it might be. In a nutshell, although it is admitted that this afflicted daughter is in dire need and suffering all the ills which follow grinding poverty, coupled with physical suffering, and although it is admitted that the estate is large and valuable, the door is closed, and the courts cannot enter, because, by the will, the executrix is clothed with the power to render a decree from which there is no appeal this side of Heaven.

If the position of counsel is correct, if their construction is the proper construction of the will, their conclusions cannot be shaken. The intention of the testator is the law which must govern the courts, and this intention must be gathered from the words employed by the testator in writing his will. The courts cannot make a will. That power rests with the testator to direct and control his estate, so long as he does not undertake to accomplish something forbidden by the laws and public policy of the state. There can be no difference about the canons of construction. The intent of the testator as expressed in the will must be the sole guide of the courts.

We have quoted item fourth (and now direct the reporter to print the entire will in his report of the case), and we will now refer to the last clause of item 2, reading as follows, viz.: "Should the income of my estate permit, of which I constitute my executrix the judge, I desire aid extended any member of my family who may be overtaken by adversity." Here the testator expressed a desire that any member of his family overtaken by adversity should be aided out of the income; but he also expressly confers upon his wife the power to decide when the income will permit this desire to be carried into effect. In this item he was providing for any member of his family overtaken by adversity, and he uses the words "I desire," and goes still further and says to his executrix, You shall be the judge of whether the income will permit this be done.

He had just provided for the younger members, and this, of course, referred to the others. But did it refer to complainant in this bill? We think not. The will clearly recognizes as the family those members who were at home in Mississippi, and, when testator speaks of "my family," it is evident that he had in mind the children at home; and if adversity should overtake any of that group, he expresses a desire that aid be extended to them out of the income of the estate, leaving to his executrix to decide whether or not the income would permit this to be done. Adversity is opposed to well-being or prosperity, and it has been said, "Adversity is not without comforts and hopes." So this lawyer, when he wrote his last will and testament, choosing his words with full knowledge of their shades of meaning, and thinking some one of his family might not prosper, but might lag behind in the race of life, he expressed a desire that his wife would give a lift to any member of the family so overtaken by adversity; but she was to be the judge when the income would permit her to do so. He was then anticipating that some one

of the family might be unlucky and fail to keep his head above the water. Undoubtedly the words employed in item 2 were precatory, and the discretion was given to the executrix to extend aid to the class mentioned, if she deemed it wise to do so.

His daughter, Mrs. Patterson, was put in a separate class, and item 4 refers to her alone. She was married, and, besides, while it was only necessary to merely suggest to a mother his wish that her children should be given a lift whenever they should meet with adversity, he no doubt advisedly used a stronger word when he penned item 4, providing for the possible need and dependence of his daughter by another marriage. He had the deepest affection and the most abiding confidence in his wife, but he also knew that he was then providing for one who could not claim the same affection from his executrix that nature implanted in her heart for her own offspring, or for the members of the family who still hovered about the roof-tree. It will be noted that he fixed the conditions when aid should be extended to Mrs. Patterson, and he did not confer upon the executrix the authority to decide when the income would permit a sale of a part of the estate to realize money to meet this charge. This is the significant and controlling feature of this charge upon his estate, and is easily differentiated from the precatory words employed in item 2. This item clearly fixes a charge upon the body of the estate for the purpose of relieving Mrs. Patterson in her present need and distress. The limit of the money to be appropriated to that purpose is fixed at three hundred dollars per annum, and the amount to be given, limited as it is by this maximum, is not left to the judgment of the executrix; but the chancellor must be guided by the amount of the income and the reasonable needs of the other dependent members of the family in fixing the amount to be paid appellant.

The executrix should be required to pay to Mrs. Patterson such amount as will, in the judgment of the chancellor, fairly ameliorate her troubles, even though the money will have to be raised out of the body of the estate. Such was the mandate of the testator, and his will is the law of the case. We have gathered from the will and the allegations of the bill that Mrs. Patterson is the sole living issue of testator's first marriage; but this makes no real difference, as the language of item 4 must be construed as mandatory.

Reversed and remanded with leave to answer within sixty days after the filing of the mandate in the chancery court of Lowndes county.

Reversed and remanded.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

MARCH TERM, 1912.

D. D. DODGE *v.* J. W. CUTRER.

[58 South. 208—56 South. 455.]

1. **CONTRACT.** *Parol evidence. Consideration. Trial. Peremptory instructions.*

Parol evidence is admissible to explain or even contradict a written contract as to the mere consideration; but when the consideration is contractual, parol evidence is no more admissible to vary that than it is any other part of the written instrument.

2. **TRIAL.** *Peremptory instructions. Evidence.*

Where the evidence is conflicting on the issue involved, a peremptory instruction should not be given.

APPEAL from the circuit court of Coahoma county.

HON. SAM C. COOK, Judge.

Suit by D. D. Dodge against J. W. Cutrer. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

D. A. Scott and Frank Johnston, for appellant.

Geo. Winston and Charles Clark, for appellee.

No brief of counsel for either side found in the record.

McLEAN, J., delivered the opinion of the court.

The original opinion is found reported in 56 South. 455. At the earnest solicitation of counsel for appellee, we have once more traveled through this record.

Sweatman v. Parker, 49 Miss. 30, was cited for the sole purpose of showing that the party for whose benefit the contract is made has a right to bring suit in his own name. In addition, we cite *Washington v. Soria*, 73 Miss. 665, 19 South. 485, 55 Am. St. Rep. 555, wherein *Lee v. Newman*, 55 Miss. 365, is explained and to some extent overruled. The agreement executed by appellee is not a mere guaranty or indemnity, but is an absolute promise to pay "any and all debts for which H. C. Dodge and F. E. Dodge are jointly liable, or which were or are a part of the indebtedness contracted and owing by the firm of H. C. Dodge and F. E. Dodge, who lately conducted business as partners on the above-mentioned lands in Sunflower county, Miss." It would be doing violence to the terms of this contract to hold that it was a mere guaranty or indemnity to hold Mrs. Dodge harmless from the payment of this debt. The record shows appellee reserved out of the purchase price what the parties supposed was an amount sufficient to pay off and liquidate certain debts, among which is the debt sued on.

The court below ruled that parol evidence was admissible to show the consideration. The rule is well settled that ordinarily parol evidence is admissible to explain, or even contradict, a written contract as to the mere consideration; but, when the consideration is contractual, parol evidence is no more admissible to vary that than it is any other part of the written instrument. This

question was squarely settled by this court in *Baum v. Lynn*, 72 Miss. 932, 18 South. 428, 30 L. R. A. 441, *Thompson v. Bryant*, 75 Miss. 12, 21 South. 655, and *English v. N. O. & N. E. R. R.*, 56 South. 665. In each of these cases it was there said that a consideration, recited in a written contract merely as a fact, may be varied by parol evidence; but, when the stipulation of the writing concerning the consideration is contractual, it cannot be so varied. The terms of the contract are the propositions stated and accepted by the parties, and when these are reduced to writing, the writing settles the contract and binds the parties, and it is not competent afterwards for one of them to show by parol evidence that the written contract does not express the real agreement. So to do would be in the very teeth of the rule prohibiting the variance or contradiction of a written contract by parol. The very object of the parties in reducing the contract to writing is that it shall no longer be subject to oral disputation.

It is further contended that the peremptory instruction given by the court below should be sustained, because the evidence showed that the notes were forgeries. The evidence upon this point was contradictory, and the jury alone was the forum before which this question could be determined. We cannot consider upon this record the question as to the statute of limitations. *Duff v. Snider*, 54 Miss. 245; *Ouilette v. Davis*, 69 Miss. 762, 12 South. 27; *Burke v. Shaw*, 59 Miss. 443, 42 Am. Rep. 370.

After a thorough and painstaking consideration of this record, we see no reason to recede from the former opinion in this case, and the suggestion of error is overruled.

Suggestion of error overruled.

WILL RODGERS v. STATE.

[58 South. 536.]

1. CRIMINAL LAW. *Courts. Jurisdiction.*

Where concurrent jurisdiction is vested in two courts, the court first acquiring jurisdiction, acquires exclusive jurisdiction and if a proceeding is instituted in another court about the same subject-matter after one of the courts of concurrent jurisdiction has acquired control, the suit should be dismissed in the last court to acquire jurisdiction.

2. SAME.

When one court of concurrent jurisdiction, has acquired jurisdiction, and voluntarily relinquishes it by *nolle pros* or dismissal of the case, the other court can proceed with the case.

3. SAME.

Where a criminal prosecution was pending in a justice court when an indictment for the same offense was returned in the circuit court, and the proceeding in the justice court was then dismissed, it was proper to proceed under the indictment in the circuit court.

APPEAL from the circuit court of Forrest county.

HON. PAUL B. JOHNSON, Judge.

Will Rodgers was convicted in the circuit court and appeals.

The facts are fully stated in the opinion of the court.

J. R. Tally, for appellant.

We submit that the state had the right to elect in the outset into which forum it would go with the prosecution of this misdemeanor, and that it exercised that right and began the prosecution in the justice court, the justice court and the circuit court both having concurrent jurisdiction, and having elected to go into the justice court, the defendant then had a right to demand that he be either convicted or acquitted in that court; and

that after the state had brought him to trial there, the state had no right to play with the jurisdiction of that court as merely using it as a post to hitch the defendant to until it got ready to try him in the circuit court; and that the state cannot be permitted to play his game of hide and seek as to jurisdiction at its pleasure regardless of the rights of defendant. We submit that inasmuch as the state elected to begin this prosecution in the justice court it had no right through the same officers to go into the circuit court and institute another prosecution for the same offense, and then simply kick the defendant out of the justice court where he had a right to contend for his rights and bring him over to the other court because the state, as a matter of convenience, or for some other reason, decided to go into that court. We submit that if the state can use the justice court jurisdiction merely as a hole to drive the citizens into until they can get ready to march them over to some other court, it turns loose upon the people an arm of oppression that the law never contemplated.

And we submit that this court held in the case of *Neely v. State*, 56 South. 377, that when one court with concurrent jurisdiction with another has acquired jurisdiction that it is the duty of the second court acquiring jurisdiction to discontinue and let the court having the first jurisdiction try the case; and we think that the language of the court in that case condemns the proceedings followed in this case, and that for that error alone this case ought to be reversed and remanded as the circuit court did not acquire jurisdiction by the procedure here discussed.

This court in the case of *Smith v. State*, 86 Miss. 316, the court said: "The justice of the peace in this case on November 7, 1903, bound Smith over to appear before the circuit court to await the action of the grand jury on the charge of conspiring to rob. He had no power to do this and the bond is void. Code 1892, Secs. 2420 and 2421 (which sections are brought forward in the

Code of 1906) provide that justices of the peace have final jurisdiction of misdemeanors and must try and dispose of them according to law. The justice of the peace should have tried Smith and acquitted him or convicted him." And we submit that this is the law when a justice of the peace having once acquired jurisdiction of a misdemeanor is bound under the law to convict him or acquit the defendant upon the merits of said cause, that the county or the district attorney has no right to play the game that was played in this case. We are willing to concede the state a great many rights, but the state has no right to simply run over the rights of individuals guaranteed by law simply for the amusement of the great state and the large officers who may happen to be appointed or elected to represent it among the people.

Claude Clayton, assistant attorney-general, for appellee.

From a careful reading of the decisions of this court the first enunciation upon this principle of law is found in the case of *Smithey v. State*, 93 Miss. 257. But, it will be observed that in that case there had been by the justice court an actual conviction of the party, and that he had actually paid his fine at a time when an affidavit had been returned against him by the circuit court of Union county, Mississippi. And this case is to be distinguished from the case of *Smithey*, *supra*, which will be observed from a reading of the record in the case at bar, and the report of the *Smithey* case. Therefore, if they are dissimilar and involve different principles of law, no application can follow.

In the case of *Neely v. State*, the same being a recent case of this court, the *Smithey* case was followed. But it will be observed that that case also is not in point.

I concede every right given to appellant by the fundamental principles of our law, and also the statutory

enactment therein; yet, at the same time, it is impossible for me to conceive why a dismissal of this case, by a justice of the peace, could be availed of by the appellant to shield himself from bearing the just penalties of the violation of the laws of this state.

As to whether or not appellant sold the intoxicating liquors in question, that is a question of fact and was properly submitted to the jury. They have decided it in the affirmative. No right was denied him and the giving up of the right to jurisdiction in the matter by the justice court, did not in the least prohibit the exercise of the jurisdiction of the circuit court to pass upon this question.

Learned counsel in his argument refers to the fact that the county attorney was endeavoring to swap horses, or confer jurisdiction from the justice court to the circuit court. I do not know what his reasons for acting in this manner were, but I can imagine a number of reasons why he pursued this course. As a matter of fact, the ordinary justice of the peace is not learned in the law, and the rights of the state, as well as those of a defendant can be best conserved by a trial before a circuit judge, who must of necessity be a lawyer, and thereby better enabled to apply the law to the merits of the controversy.

MAYES, C. J., delivered the opinion of the court.

The main facts relied on by appellant for reversal in this case are about as follows: It appears that an affidavit was made before E. J. Wall, a justice of the peace in Forrest county, charging appellant with the unlawful sale of intoxicating liquors. The affidavit was lodged with the justice of the peace prior to the convening of the November, 1911, term of the circuit court of Forrest county. After the affidavit was made and filed with the justice of the peace, a warrant for the arrest of appellant was issued, and appellant was arrested and

placed under bond for his appearance on the 9th day of November, 1911, to answer the charge made in the affidavit. It appears that the circuit court convened on the 6th day of November, 1911, and between the 6th and 9th the grand jury returned an indictment against appellant charging him with the same offense charged in the affidavit then on file in the justice of the peace court. On the 9th day of November, the day set for the trial of appellant in the justice court, appellant appeared for trial, and the county attorney representing the state, with the consent of the court, dismissed the prosecution in the justice court. Appellant protested against this proceeding, but without success. After the dismissal of the case in the justice court, the case was called on the indictment in the circuit court, and appellant filed a plea to the jurisdiction of the court on the ground that the circuit court acquired no jurisdiction under the indictment. We need not follow the course the pleadings took; suffice it to say that it is the contention of appellant that, because an affidavit had been made in the justice court, a court of concurrent jurisdiction with the circuit court, the circuit court could not thereafter acquire any jurisdiction to proceed with this indictment for the same offense, and that the action of the county attorney was a fraud on the jurisdiction of the justice court.

In the case of *Smithey v. State*, 93 Miss. 257, 46 South. 410, and in *Neely v. State*, 56 South. 377, we held that, where concurrent jurisdiction is vested in two courts, the court first acquiring jurisdiction acquires exclusive jurisdiction, and that if a proceeding is instituted in another court about the same subject-matter after one of the courts of concurrent jurisdiction has acquired control, the suit should be dismissed in the last court to acquire jurisdiction. The above statement of the rule is undoubtedly the correct law, but those cases have no application to this case. The reason of the rule is to prevent confusion and conflicts in jurisdiction and to pre-

vent a person from being twice tried for the same offense, but no defendant has a vested right to be tried in any particular court of concurrent jurisdiction. When one court of concurrent jurisdiction has acquired jurisdiction and voluntarily relinquishes it by a *nolle pros.* or dismissal of the case, there can be no legal or logical reason for preventing the other court from proceeding. Under such circumstances, there can be no confusion or conflict between the courts for the reason that only one court then has jurisdiction, or is trying to exercise it.

At the date that this plea in abatement was filed, no other court had jurisdiction of the offense and there was therefore no impediment in the way to his trial under the indictment. It can make no difference to this appellant from what motives the justice of the peace may have acted in dismissing this suit. The justice of the peace undoubtedly had a right to dismiss it, and having done so, the appellant has no cause to complain because there is another court of concurrent jurisdiction and equally as well capacitated to try the case as the justice of the peace. The appellant can only be interested in having but one prosecution before a fair and impartial tribunal in whatever court he is arraigned for trial on the charge. The state is only interested in seeing to it that prosecutions for infraction of the law be conducted in at least one of the courts.

Counsel proceeds upon the idea that the indictment does not confer any jurisdiction on the circuit court because an affidavit had formerly been made in the justice of the peace court. This is an erroneous conception of the law. The circuit court has jurisdiction of the subject-matter, and the indictment is a valid indictment conferring jurisdiction on the court to try the offender for the offense charged, subject to his right, if the fact existed, to defeat the jurisdiction of the circuit court by showing that he was being prosecuted at the time in

another court of concurrent jurisdiction for the same offense. But the pleadings show that this was not a fact.

*Affirmed.**
Suggestion of error filed and overruled.

GEORGE SMITH v. STATE.

[58 South. 539]

1. CRIMINAL LAW. *Former jeopardy. Pleading. Demurrer.*

A former conviction before a justice of the peace competent to try the case is a bar to an indictment for the identical offense subsequently presented in the circuit court.

2. CRIMINAL LAW. *Pleading. Demurrer.*

A demurrer to a plea is a confession of the truthfulness of the averments of the plea.

APPEAL from the circuit court of Washington county.

HON. J. M. CASHIN, Judge.

George Smith was convicted of unlawful retailing and appeals.

The facts are fully stated in the opinion of the court.

Watson & Jayne, for appellant.

1. The trial court erred in sustaining the demurrer of the state to the plea of *autrefois* convict interposed by appellant.

The plea of *autrefois* convict interposed by appellant herein met all of the requirements of law and was valid. It set out therein in substance in the following allegations: (a) A former conviction; (b) of an offense cognizable by the court of a justice of the peace, which offense was committed within his district; (c) that the justice of the peace and the circuit court had concurrent jurisdiction

of the offense; that the offense whereof appellant was convicted in the court of the justice of the peace was identical with that laid in the indictment. This plea was prepared with due reference to the precedents and met the requirements of all of the authorities on Criminal Procedure. This is not of that character of plea which requires the greatest degree of certainty. It is sufficient to state the facts constituting the former jeopardy. *Helm v. State*, 66 Miss. 537.

2. The trial court erred in excluding the evidence sought to be brought out by appellant by cross-examination of the witnesses for the state, showing his former conviction in the justice of the peace court on the charge of which he was indicted, and also tending to show that at said trial before said justice of the peace, evidence was introduced of other sales made by him anterior to December 2, 1911.

The trial court should have admitted the evidence tending to show the former conviction of the appellant in the court of the justice of the peace for two reasons: (a) that the evidence went to the identification of the offense of which he was tried in the justice court with that of which he was being tried in the circuit court, so far as the sale of December 2, 1911, was concerned; and (b) because the evidence tended to show that on his trial before the justice of the peace, evidence was introduced of other sales made anterior to December 2, 1911, and within two years next prior thereto. *Wadley v. State*, 96 Miss. 77; *Neely v. State*, 56 South. 377.

3. The trial court erred in denying appellant leave to file his plea of *autrefois* convict during the progress of the trial in the circuit court.

Even if the trial court was correct in sustaining the demurrer to appellant's plea of *autrefois* convict, still he should have been allowed to interpose his plea again during the trial under the facts there developed. *Wadley v. State*, 96 Miss. 77; *Neely v. State*, 56 South. 377.

In *Wadley v. State*, no specific date being alleged upon which the offense was committed, the court says:

“As the indictment did not allege the date on which the violation occurred, and as it was returned subsequent to the conviction of appellant in the justice court, it would hardly be expected that he would file the plea of former conviction until it developed in the state’s testimony that the state intended to rest its prosecution on a sale occurring prior to the conviction before the justice. It may be better practice to file the plea of former conviction before the trial commences, if the defendant knows such fact as would justify the plea at that time; but in this case we know of no rule of pleading that makes it imperative for a plea of this nature to be filed before the trial is begun, and to so hold in this case would thwart justice.”

In the case at bar the state relied in part on the identical offense covered by the plea of *autrefois* convict, and also on other sales made within two years next prior thereto, the indictment alleging a later date than any of these offenses, therefore, as stated in the *Wadley* case, the appellant could hardly be expected to file his plea of former conviction as to these sales made anterior to his conviction until the testimony of the state indicated that it intended to rest its prosecution on such sales. After this developed, appellant should have been allowed to file his plea of *autrefois* convict, and to show by evidence that the state introduced evidence before the justice of the peace, showing and relying on sales anterior to the one of December 2, 1911.

As has been often said by the courts and text writers, a plea of *autrefois* acquit and *autrefois* convict are favored pleas in the law and in the case at bar; we fail to see any sound reason in law or fact why at this stage in the progress of the trial of this cause, appellant should not have been allowed to avail of his plea of *autrefois* convict and of the evidence sought to be introduced sustaining the same.

Frank Johnston, assistant attorney-general, for appellee.

I am not prepared to say that the action of the court was correct in sustaining the demurrer to the plea. If it was a correct ruling at all, it was exceedingly technical, and could only have proceeded upon the technical point that the precise date of the offense of which the defendant had been convicted before the justice's court had not been named in the plea. The plea unquestionably avers expressly, and positively, that the time named in the affidavit, or the date of the offense there charged on which he was tried and convicted in a former case was the same offense charged under the indictment.

The defendant, after the demurrer was sustained, and when the development of the particular sale relied on for his conviction under this indictment by the state's testimony had been made, then offered to prove that that identical sale was testified to as the charge upon which he was convicted under the indictment in the justice's court; and again, after the date of the sale had been again fixed by Vance and Jones, state's witnesses, he asked to be permitted to prove that, in point of fact, the sales, under the indictment and the affidavit, respectively, were the same, and then further, *ex industria*, the defendant asked leave of the court to interpose a plea of former conviction.

This is a full and accurate statement of the question decided by the court below in both its phases, and the correctness of which I now respectfully submit to this honorable court without argument. I desire to state, however, that this matter of the number of offenses that may be given in evidence on a charge of liquor selling, and the matter of the plea of former conviction, or acquittal, in such cases, is fixed by Sec. 1762 of the Code of 1906. This statute was construed by this court in the case of *Wadley v. State*, 96 Miss. 77, in which this question, presented in the present case, was considered and

adjudicated. Accordingly, I now respectfully submit the case for the consideration and decision of the court.

Cook, J., delivered the opinion of the court.

Appellant was indicted in the circuit court of Washington county for the unlawful sale of intoxicating liquors. He pleaded in bar a former conviction for the identical offense charged in the indictment, by a justice of the peace competent to try the case. The state demurred to this plea, the demurrer was sustained, appellant was placed upon trial, and convicted.

We have been unable to conceive why this demurrer was sustained. If the facts stated in the plea were true, appellant was undoubtedly entitled to a discharge. The demurrer confessed the truthfulness of the averments of the plea, and manifestly it should have been overruled.

Reversed and remanded.

BEN TAYLOR v. STATE.

[58 South. 593.]

1. CRIMINAL LAW. *Jurisdiction. Affidavit. Pleading. Replication. Demurrer. Proof. Variance. Code of 1906, Secs. 1746, 1773. Laws 1908, Ch. 115. Intoxicating liquors.*

A justice of the peace cannot acquire jurisdiction to try an accused where no affidavit has been lodged with him, charging an offense.

2. REPLICATION. *Demurrer. Pleading.*

A demurrer to a replication admits the facts therein stated.

3. INTOXICATING LIQUORS. *Sale. Indictment. Variance. Code 1906, Secs. 1746-1773. Laws 1908, Ch. 115.*

Where a defendant is indicted under Code of 1906, Sec. 1746, as amended by Laws 1908, Ch. 115, generally for selling intoxicat-

ing liquors in a certain county, the fact that the evidence develops that the sale was made at a "place of amusement," which is punished under Sec. 1773, Code of 1906, as amended by Laws of 1908, Ch. 115, did not constitute a variance and defendant was properly sentenced under the former section.

APPEAL from the circuit court of Forrest county.

HON. PAUL B. JOHNSON, Judge.

Ben Taylor was convicted of unlawful retailing and appeals.

The grand jury of Forrest county returned an indictment against appellant, charging "that Ben Taylor, on the 24th day of April, 1911, in Forrest county aforesaid, did unlawfully sell and retail intoxicating liquors, against the peace and dignity of the state of Mississippi."

The defendant filed a plea in abatement, which alleged that "he is now, and was prior and at the time of the finding and return of said indictment, under bond to appear before a justice of the peace to stand trial in said justice court on the precise and exact and same offense charged against him in said indictment; that there is now, and was prior to and at the time of the presentation of said indictment against him, a pending cause against him in said justice court for the precise and exact and same offense undisposed of; that he was placed in jail under arrest by the sheriff of said county, on a warrant issued on an affidavit charging the defendant with the self-same offense; that this defendant executed an appearance bond, conditioned for its appearance for trial in said cause in said court, which said affidavit was made by the deputy sheriff of said county, and this defendant therefore denies the jurisdiction of this court to try him on said cause, and prays to be discharged.

To this plea, the district attorney filed a replication, which is in the following language: "That, about three weeks prior to the return of the indictment in this cause

against the defendant, D. G. McGilvary, a deputy sheriff of said county, made an affidavit against the defendant, charging him with the unlawful sale of intoxicating liquors as charged in this indictment, said affidavit returnable before said W. F. Wedgeworth, mentioned in the defendant's plea; that the defendant was arrested and placed under bond on said charge; but, as a matter of fact, the said affidavit was never lodged with said justice of the peace, nor the bond delivered to him, or filed in his court; that after the defendant was placed under bond for said offense, the grand jury of Forrest county convened, when the indictment against him was returned. Therefore the state denies that this court has not ample jurisdiction in this cause, and avers that this court has ample plenary jurisdiction in this matter, unaffected by the taking of said bond and the making of said affidavit by the said D. G. McGilvary, and this the state is ready to verify." To this replication, a demurrer was filed, which was by the court overruled. This action of the court is made one of the grounds assigned as error.

Currie & Currie, for appellant.

The appellant filed a special plea to the jurisdiction of the court alleging in substance: That prior to the return of the indictment against him by the grand jury and at the time of the trial thereon in the circuit court, there was pending in the justice court of the beat in which the alleged offense was committed, a prosecution against him undisposed of for the precise and exact offense charged against him in the indictment, that the justice court first acquired jurisdiction and held it to the exclusion of the circuit court. The state in its reply to this plea admitted that an affidavit had been made, warrant issued, the defendant arrested thereunder and an appearance bond executed by him returnable before a justice of the peace in said beat to answer the state

on the offense charged in the indictment. To this plea the defendant (appellant) demurred, the demurrer was overruled and the defendant (appellant) excepted. The action of the court in overruling the demurrer is assigned as error.

Sec. 1154 of the Code of 1906 defines the commencement of a prosecution as follows: "A prosecution may be commenced, within the meaning of the last preceding section, by the issuance of a warrant, or by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit. "This was the beginning or commencement of a prosecution. The broad and sweeping language of this statute is enacted for the benefit of the state against the interest of an offender. It operates to enable the state, first, to avoid the running of the statute of limitations, and second, to enable the state speedily to acquire jurisdiction of the person of the offender without the necessity of an indictment or affidavit in order that he may be surely brought to justice without opportunity to escape. By the warrant, the arrest and the appearance bond, an action or prosecution was commenced against the defendant in the justice court before which it was returnable. That prosecution was pending undisposed of at the time of the trial of the defendant in the circuit court and the justice court had jurisdiction.

This statute relates to prosecution for crime and its language must be strictly construed. Its scope cannot be enlarged or abridged by interpretation or exception. It must be taken at precisely exactly what it says.

Sec. 2749 of the Code of 1906, confers final jurisdiction on justice court, to try all misdemeanors; and this jurisdiction is concurrent with the circuit court, equal in power and authority, extent and finality. *State v. Sinnott*, 35 Atl. 1007, 89 Me. 41, 30 N. E. 1050.

In such case the court first acquiring jurisdiction retains it to the exclusion of all other courts having con-

current jurisdiction. 12 Cyc. 197; *District of Columbia v. Libby*, 9 App. Cas. 321; *Mize v. State*, 49 Ga. 375; *State v. Spayde*, 110 ——— 726, 80 N. W. 1058, 29 N. W. 428; 40 Pac. 662, 91 N. C. 529; 9 Tex. 43; 28 Fed. Cas. No. 16,665.

On the foregoing authorities we urge that the circuit court was totally without jurisdiction to try the case and that its judgment is utterly void.

The next assignment of errors to which we direct the court's attention is the refusal of the court to grant the defendant a peremptory instruction at the conclusion of the state's testimony. The defendant was being prosecuted under the code section punishing the sale of intoxicating liquors—that is section 1746—and the proof showed the defendant guilty, if guilty at all, of selling whiskey at a place of amusement, and the defendant not having been indicted for that offense and the state having failed to amend its indictment so as to correspond with the proof, the defendant was clearly entitled to acquittal. We urge this view upon the court with much stress and confidence. The defendant, we say, if guilty at all, was guilty of a violation of Sec. 1773 of the Acts of the Laws of Mississippi, 1908, and not of Sec. 1746 of the Code of 1906. In the first place the proof shows that the defendant carried the whiskey to a place of amusement and sold it there, if at all; the proof shows that the defendant was a farmer, lived in the country and was not engaged in the "wet goods" business as a "blind tiger," and essentially is not guilty of the character of the offense prohibited in Sec. 1746, Code 1906; the proof shows that he himself was drunk and that he sold the whiskey openly and indiscriminately to all who applied for it, if indeed he sold it at all, everybody having a glorious and hilarious "time"—everybody drunk and drinking and eating and fiddling and dancing "at the frolic;" the proof shows that this defendant did precisely what the legislators foresaw a man with a little

whiskey might do—carry it to a frolic, get drunk himself and then give or sell it to others—although not engaged in the liquor business, that he ought to be slightly punished and so it made the penalty much less severe than in the case of a “cold-blooded blind tiger” in the business for money.

This view gains much strength when we consider the history of Sec. 1773 of the Laws of 1908. This section appeared for the first time in the Code of 1892 and is Sec. 1606 in that Code, and prohibits and punishes only the carrying and giving away of whiskey or intoxicating liquors at such places. This section reappears in the Code of 1906, and in Sec. 1773 of that Code and prohibits and punishes only the carrying or giving away of intoxicating liquors at such places. This section appears in the Acts of 1908, and is Sec. 1773 of said acts, and for the first time prohibits and punishes the sale of intoxicating liquors at such place. The act as it is now written prohibits and punishes (1) the carrying of intoxicating liquors to such place; (2) the giving away of intoxicating liquors at such place; (3) the selling of intoxicating liquors at such place. Division (3) of this analysis is the offense of which the proof in this case shows the defendant guilty, if guilty of any offense, and the indictment not charging him with this offense, the defendant was entitled to his discharge.

This contention is also greatly strengthened by the vast difference in the punishment to be inflicted; the imposition of a confiscatory money fine of five hundred dollars, and the imposition of the extreme penalty of ninety days in the county jail intended for the “breaking of the enlained blind tiger” is not the fine and penalty intended to be imposed upon a farmer who, in a drunken condition, his reason dethroned, happens to visit a place of amusement or social gathering, and while in that condition carries whiskey to the place and gives it away or sells it; the turpitude of such act is not such as to justify

the infliction of such punishment; this present case, if permitted to stand, would be a perfect illustration of the cruelty and barbarity of such a law as would authorize such punishment.

Frank Johnston, assistant attorney-general, for appellee.

To vest the justice's court with the prior jurisdiction, under the general rule which governs the doctrine of concurrent jurisdiction, in order for the first court to have jurisdiction, there must have been some proceeding legally begun in that court followed by the arrest of the defendant; but here there was no affidavit in the justice's court whatever. Therefore, the issuance of the warrant of arrest was illegal and without authority, and the bond that was taken by the constable was without authority, and the justice court was without jurisdiction.

Suppose for illustration, there had been an arrest by a court officer of a defendant, that subsequently an affidavit had been filed legally, followed by the issuance of process and the arrest of defendant, and suppose it appeared as a fact that no indictment was ever found in the circuit court, it would clearly follow that the circuit court in that case had never acquired jurisdiction in the case, and the justice's court would have been left free therefore to proceed in the trial of the case.

On the facts in this case, therefore, I do not hesitate to submit confidently to the court the proposition that the case now before the court does not come within the ruling in the *Smithey Case*, 93 Miss. 257. This being the precise question presented for decision, and the only question arising on this jurisdictional question, I have not attempted any review of the authorities on the general question of concurrent jurisdiction, except that I have examined very carefully the decisions cited in the brief of counsel in support of their contention, and I will now submit to the court a brief summary of those cases of which will be found in point to the case at bar.

In *Mize v. State*, 49 Ga. 375, the plea was *autrefois* convict. Mize was indicted for gambling, and on the trial he pleaded a former conviction for the same offense in the court of a justice of the peace, and from the facts in that case it appeared that the prosecution was first begun in the justice's court, which had fully acquired jurisdiction of the same.

The case of *District of Columbia v. Libbey*, 9 App. Cas. (D. C.) 321, Libbey and the other defendants were proceeded against in the police court of District of Columbia for a violation of an ordinance of the city of Washington. Pending this proceeding, defendants had a writ of *certiorari* to transfer the case from the police court to the Supreme Court of that district. The courts had concurrent jurisdiction generally speaking, but the court held in this case that the writ did not lie, because in that particular case, the police court did not have jurisdiction. There was a verdict for the defendant in the Supreme Court of the district, and the judgment was affirmed on appeal. The court said: "It was useless to reverse and remand the case to the police court, because that court did not have jurisdiction."

The *State v. Mikesell*, 30 N. W. 474, was a plea of *autrefois* acquit, and this plea was for an acquittal for the same offense under a former indictment.

In the case of *State v. Shinault*, 40 Pac. 662, the question was between the jurisdiction of two courts of record. The district court of Wyandotte county had a prosecution pending in an indictment charging an attempt to kill; an information was afterwards filed in the court of common pleas, and it was held that the first court had the jurisdiction because of the facts disclosed in that case, the first court had fully acquired the jurisdiction of the case.

In *State v. Williford*, 91 N. C. 529, the defendants were indicted in the superior court, and there was a commitment pending this case in the inferior court of

Hertford county, and it was held that such proceeding in the inferior court did not affect the indictment presented in the superior court.

The general rule is announced in *Burdette v. State*, 9 Texas. There an indictment was pending in a court of record; afterwards a prosecution was begun in a justice's court, resulting in a conviction, and the court held that that proceeding and conviction was no bar to the indictment.

Counsel for appellant, proceed in their argument in regard to the statute under which this indictment was framed upon an erroneous conception of the statute. The indictment in this case was simply for the illegal sale of whiskey. It is clearly based upon Sec. 1746, of the Code of 1906, which makes the sale of intoxicating liquors a misdemeanor, and fixes the punishment therefor, and which warranted the sentence pronounced in this case.

Sec. 1773 of the Acts of 1908, p. 118, it is true, has never been repealed. It is now the law of the state, and this statute makes it a misdemeanor to sell or to give away any intoxicating liquor or beverages at any public assembly. It is true that the evidence shows in this case that the defendant sold whiskey at a public assembly, but it is equally true that he was guilty of a violation of Sec. 1746 of the Code. The fact, therefore that he was indicted under Sec. 1746 of the Code of 1906, for selling liquor, which is condemned by that statute, is not affected by the proof which showed that this illegal act of selling liquor was on the occasion of a public assembly.

There is no variance, therefore, between the indictment and the proof, and no complication arising out of any question as to what statute the indictment was based upon.

Under section 1746 which carries a heavy penalty, the giving away of intoxicating liquors is not included, but

the selling of intoxicating liquors is expressly forbidden.

Section 1746, therefore, fixes the punishment for the illegal sale of liquor with more severity than the punishment prescribed by the act of 1908. But this consideration does not affect the validity of the indictment in this case, nor the fact of the actual sale of the liquor as shown by the testimony in the case.

MAYES, C. J., delivered the opinion of the court.

The facts set out in the replication to the plea in abatement filed by appellant, clearly show that no justice of the peace had ever acquired jurisdiction to try this appellant for the crime of selling intoxicating liquors. The demurrer to the replication admits all the facts stated in the replication, and these facts show that no affidavit, charging the appellant with the unlawful sale of intoxicating liquors, was ever lodged with any justice of the peace; nor was any appearance bond ever given to any justice of the peace, or filed in his court. In short, it appears from the replication that, if any affidavit was made under which the appellant was arrested and placed under bond, it was wholly irregular, and not made before the proper justice of the peace, and the taking of bond was without any legal authority. Of course, under these facts, there was no ground shown for any plea in abatement.

The only other question we desire to discuss is this: The indictment charges appellant with selling intoxicating liquors in Forrest county; the proof undoubtedly furnished the jury with ample grounds for convicting. But it is contended that the proof shows that if any sale was made it was made at a place of amusement, and, since the indictment does not so charge, there is a fatal variance between the indictment and the proof. The indictment in this case is under Sec. 1746 of the Code of 1906, as amended by Ch. 115, Laws 1908, and is an indictment

generally for the sale of intoxicating liquors in Forrest county. The indictment does not attempt to charge where the sale was made, except that it was made in Forrest county. Sec. 1746 of the Code, amended as above, provides that any person violating same shall be fined "not less than fifty dollars, nor more than five hundred dollars, or be imprisoned in the county jail not less than one week, nor more than three months, or both."

When appellant was convicted, he was sentenced to pay a fine of five hundred dollars, and to serve an imprisonment of ninety days, in accordance with Sec. 1746 of the Laws of 1908. It is contended that the court could not sentence under this section of the Code at all, and that the case should have been dismissed, because, if the appellant was guilty, he was guilty of selling at a place of amusement, which is punished by Sec. 1773, p. 118, Laws of 1908, in a different way; that is to say, since the proof showed that the sale was made at a place of amusement, he was guilty, if at all, only of the crime made by Sec. 1773 of the Laws of 1908. The above section of the Laws of 1908, p. 118, is as follows: "If a person carry to any place of amusement, social entertainment, or to any public assemblage intoxicating liquors of any kind, or if he sell or give away such intoxicating liquors at any such place, he shall upon conviction, be fined not less than ten dollars, nor more than fifty dollars, or imprisoned in the county jail not less than one week, nor more than one month, or both."

We do not think there is anything in this contention. The charge in the indictment is made under section 1746 of the Code, as amended, and it is that he sold intoxicating liquors in Forrest county, and the proof shows that he did this. It may be true that the proof shows that the sale was made at a place of "amusement or social entertainment;" but such proof was not at all necessary to establish the crime charged, and when the

proof showed that the sale was made at a place of amusement it also showed that it was made in Forrest county; and no matter where made, it was unlawful under the general law, the law which appellant was prosecuted for violating. If the indictment had been drawn under Sec. 1773 of the Laws of 1908, and had charged the sale to have been made at a place of amusement, of course, the proof would have had to correspond. But this indictment charges a general sale of intoxicating liquors under Sec. 1746 of the Code, as amended. The fact that the proof showed that the sale of intoxicating liquors was at a place of amusement does not change or meliorate the offense charged in the indictment, or make of it a different offense. It was proper for the court to sentence as it did. *Affirmed.*

MOORE & TABB v. JOHNSON COUNTY SAVINGS BANK.

[58 South. 646.]

BILLS AND NOTES. Defenses. Admissibility.

In a suit on a draft indorsed in blank by the drawer so as to make it negotiable by delivery, no defenses available between the original parties are admissible; but where such draft is specially indorsed our anti-commercial statute applies and all defenses available between the original parties can be pleaded.

APPEAL from the circuit court of Chickasaw county.
HON. H. K. MAHON, Judge.

Suit by Johnson County Savings Bank against Moore & Tabb. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Joe H. Ford, for appellant.

The court should have admitted the evidence offered on behalf of appellants in the court below. It will be noted that the orders or acceptances in this case were drawn by the Puritan Manufacturing Co. at Iowa City, Iowa, and were addressed and forwarded to appellants at Houston, Miss., for acceptance there. They were received in due course and accepted by appellants at their place of business in Houston, with the agreement that they were payable at the Branch Bank of the Okolona Banking Co., at Houston, and were payable to order. It was not stated in the acceptances where it should be paid. Thus the question, "Where were the drafts or acceptances payable, and does the law of Mississippi govern?" was the question to be answered. The appellants took the position that they were payable at Houston, Mississippi, and that therefore they could make the defenses attempted under Sec. 3503, Code of 1892 (Sec. 4001, Code 1906). Appellee took the position that they were payable in Iowa City, Iowa, and that therefore the Mississippi law did not apply. 1—Let it be noted that the acceptances were drawn in Iowa City, Iowa, in favor of the Puritan Manufacturing Co., or order, and were addressed, "To Moore & Tabb, Houston, Miss." On the face was written, "Accepted, Moore & Tabb." No place of payment was designated in the face of the bills. Therefore they were payable, under the law, at the residence or address of acceptors, which was Houston, Miss. *Frazier v. Warfield*, 9 S. & M. 220; *Fellows v. Harris*, 12 S. & M. 462; *Freese v. Brownell*, 35 N. J. 285, 10 Am. Rep. 239; *Cox v. New York Nat. Bank*, 100 U. S. 704, 25 L. Ed. 739; 7 Cyc. 605, and a great number of authorities cited in note 45; Norton on Bills & Notes (3 Ed.), p. 186; *Miller v. Bank*, 76 Miss. 84; 1 Randolph on Com. Paper (2 Ed.), Sec. 26, p. 25 and Sec. 122.

This evidence was admissible to show where the bills were actually accepted, it being the law that the law

which governs acceptors' liability is at the place where it is accepted, that place in this case being Houston, Miss., which was likewise the place to which the bills were addressed to appellants, and where they reside, This is the law unless the contrary is expressed in the bill. Norton on Bills & Notes (3 Ed.), p. 186; 7 Cyc. 782-E., and other authorities there cited; 8 Cyc. 272 (Ill.); 2— But it is further said, that even if the acceptances are governed by the Mississippi law, yet in as much as they were drawn by the Puritan Manufacturing Co., payable to the Puritan Manufacturing Co., or order, that our anticommercial statute does not apply, and that the defenses attempted to be set up by the evidence offered by the defendants in this cause could not be made to said acceptances in the hands of Johnson County Savings Bank, on the theory that such bills so drawn and payable are in reality payable to bearer,—citing as authority for that position, *Gillespie v. Oil Mill*, 76 Miss. 406, *Bank v. Wofford*, 71 Miss. 712, and the many other cases holding that our anticommercial statute does not apply to notes and bills of exchange made payable to bearer, or to order of the drawer or maker or subsequently indorsed by him in blank, which are equivalent to notes and bills of exchange payable to bearer originally. The law of those cases cannot be disputed when applied to the proper facts, but the rules laid down therein certainly do not apply in the case at bar.

It will be noted, by reference to the originals attached to page 29 of the transcript, that these acceptances were indorsed as follows: "May 24, 1904, Pay Johnson County Savings Bank, Iowa City, Iowa, or order, Puritan Manufacturing Co." This being not an indorsement in blank by the Puritan Manufacturing Co., the original drawer and payee, but a special indorsement. An indorsement in blank specifies no indorsee, or, in other words, names no special person to whom the instrument shall be paid. Norton on Bills & Notes (3 Ed.), p. 110,

et seq.; 7 Cyc. 799; 1 Randolph on Com. Paper (2 Ed.), Sec. 13, p. 13; 2 Randolph on Com. Paper. (2 Ed.), Sec. 705.

Wherever the indorsement specifies the person to whom, or to whose order the instrument is payable, it is a special indorsement and can only be collected by the person named in such indorsement, or assigned by his subsequent indorsement.

Norton on Bills & Notes, p. 116 (3 Ed.), *et seq.*; notes and bills of exchange indorsed specially are not payable to bearer unless the original note or bill of exchange is payable to bearer, and therefore stands upon the same footing of a note or bill of exchange payable to order and not indorsed at all. The same defenses may be made to a special indorsee under our anticommercial statute as may be made by the maker or acceptor to the original payee or drawee. A clear distinction is made between such instruments made payable to bearer, or to order, and indorsed in blank, and those which are made payable to order originally, and indorsed specially. Norton on Bills & Notes (3 Ed.), p. 116, *et seq.*; *Bank v. Wofford*, 71 Miss. 711; *Gillespie v. Oil Mill*, 76 Miss. 406; and many other authorities from Mississippi cited in these two cases in our own court.

Many other cases from other states could be cited, but it is unnecessary since they make the same distinction between special and blank indorsements, and bills and notes payable to order and to bearer, as our state makes. This can be very clearly seen by reference to *Poorman v. Mills*, 35 Cal. 118, 95 Am. Dec. 90; *Johnson v. Mitchell*, 50 Tex. 212, 32 Am. Rep. 602; and *Voss v. Chamberlin*, 117 N. W. 269, 19 L. R. A. (N. S.) 106. In these cases it may be seen by reading them that the court says that a note or bill of exchange payable to order and indorsed in blank, are by such indorsement payable to bearer "so long as such indorsement continues." In the case of *Voss v. Chamberlin*, *supra*, being the case

decided by the supreme court of Iowa, notes were taken payable to three parties, or order. The notes were indorsed by the payee to three parties, or order. The notes were indorsed by the payees simply writing on the back thereof, in substance, a guarantee of payment, waiving demand, notice or protest, without stating in the indorsement the name of any particular indorsee. These notes were then placed in the Exchange Bank, presumably for safe keeping, so indorsed. Said notes were taken by the Exchange Bank without the knowledge or consent of the payees and indorsers, and pledged as security to the Bank of Denison, of which C. L. Voss, the plaintiff, was the cashier, the latter being *bona fide* purchasers, without notice of any fraud on the part of the Exchange Bank. The Bank of Denison brought suit to recover the amount of said notes. The payee and indorsers, Chamberlin et al., defended on the ground that the notes, being payable to order, could not be collected by the bank to whom they had not been specially indorsed, and that they had a right to set up the fraud of the Exchange Bank as a defense in transferring the notes to the Denison Bank. The Denison Bank claimed that the indorsement on the back of those notes was nothing more than a blank indorsement, and, therefore, said notes by such blank indorsement, thus became payable to bearer, and could be collected by them as *bona fide* purchasers. The defendants contended that such indorsement amounted only to a guarantee that the notes were good, and did not constitute an indorsement at all, or at least did not constitute an indorsement in blank. Thus the question to be decided in that case, was whether it was an indorsement in blank. If it amounted to an indorsement in blank, it was payable to bearer; and the Bank of Denison, being the bearer, could collect. If it was not an indorsement in blank, the notes being payable to order, the Bank of Denison, the bearer, could not collect. The court held that it was nothing

more than an indorsement in blank, and having fallen in the hands of the Bank of Denison, *bona fide* purchasers, they could not collect them.

The indorsement of the bills of exchange in the case at bar, which are themselves payable to order, not having been indorsed in blank, but specially indorsed to Johnson County Savings Bank, "or order," did not fall within the class of those decisions of our court, to wit: *Bank v. Wofford*, *Gillespie v. Oil Mill*, and many other cases cited above.

And the same defenses that could be made by appellants against the Puritan Manufacturing Co., the original payees and drawers, could be made against the Johnson County Savings Bank, the special indorsees, and the exclusion by the court of the original contract and other evidence offered by appellant in the court below, establishing fraud, failure of consideration, want of consideration, and damages resulting from breach of warranty on the part of the Puritan Manufacturing Co., under our anticommercial statute, was error. This case is governed by *Miller v. Bank*, 76 Miss. 84; *Brown v. Bank*, 62 Miss. 54; *Wilkinson v. Searles*, 70 Miss. 392; *Millsaps v. Bank*, 69 Miss. 918.

L. P. Haley, for appellees.

These bills of exchange were Iowa contracts. A casual reading will disclose this fact. They read as follows: "Puritan Manufacturing Co., Iowa City, Iowa, March 29, 1904. Ten months after date pay to the Puritan Manufacturing Co., etc. . . ." The only question is, where is the domicile of the Puritan Manufacturing Co.?

These bills of exchange were indorsed to the appellees in Iowa City, Iowa, and the domicile of appellees is Iowa City, Iowa. The bank in Houston, Mississippi, simply acted as the agent of appellees for the collection of the bills of exchange, and that fact has nothing to do

with the place of payment. The law of the place of payment will determine the acceptor's liability, if such place is expressed in the instrument. Randolph on Commercial Paper, Sec. 31, p. 34. This was a straight indorsement, such as is used in all the commercial world. A stencil or blank indorsement in *Bank v. Wofford*, 71 Miss. 711, Chief Justice Campbell said: "The application of the doctrine has been to paper payable in terms to bearer, but not a note payable to the order of the maker, and indorsed by him, is, when it comes into being as an inforcible contract, payable to bearer, although not so expressed. It is nothing until indorsed and delivered, and then it is payable to bearer, and transferable by delivery and all the reasoning applicable to instruments payable to bearer applies in full force to it. It follows that both are on the same footing, and there is no magic in the word "bearer," etc. . . ." In *Gillespie v. Oil Mill*, 76 Miss. 406, it is decided: That the holder of a bill of exchange to drawer and by him indorsed in blank, is *prima facie* a *bona fide* holder for value.

"The act of acceptance operates as an estoppel in respect to any antecedent matter. Want of consideration cannot be set up."

Joyce on Defenses to Commercial Paper, Sec. 641, p. 793: "An unconditional acceptance binds the acceptor as to a *bona fide* payee or holder for value."

Joyce on Defenses to Commercial Paper, Secs. 199 and 203: "The counsel for appellants in this case has recently had some experience in litigation similar to this case now at bar in the case of *Cologers v. Cedar Rapids National Bank*, 55 South. 489. And this case simply followed the case of *National Bank v. Rhodes*, 96 Miss. 700. In the *Cologers* case the note was torn from the contract and a perforation was clearly to be seen on the note. The note was made at the same time the contract was made, and was made in the city of Okolona, Mississippi. However, the note read Cedar Rapids, Iowa, and was dated the same date as the contract.

Story on Bills of Exchange, Sec. 252, says: "When acceptance is once made, if the bill of exchange has been delivered to the holder, the transaction is complete and the acceptance is irrevocable." In the case at bar the making of the contract was a complete transaction—also (as set out in the contract) the closing of the account by giving four acceptances, was another complete transaction. Not only did appellants close the account by giving four acceptances, but they actually paid to appellees two of these acceptances without a murmur.

A clearer case of estoppel could not be had. Appellants cannot be heard to complain at this late day. They put this negotiable paper out on the world and proceeded to pay them, and they certainly cannot at this late day complain. *Davis v. McCready*, 72 Am. Dec. 461. By reading the facts in *Miller v. Bank*, 76 Miss. 84, it will be seen that this case does not apply to the one at bar.

Cook, J., delivered the opinion of the court.

The appellants, Moore & Tabb, were engaged in the drug business in Houston, Miss., and carried jewelry as a side line. A persuasive salesman from Iowa City, Iowa, called upon the firm, and spread before them alluring pictures and circulars advertising the high grade and valuable line of jewelry manufactured by the Puritan Manufacturing Company, of Iowa City, Iowa. This line of jewelry was strictly first-class, and the attractive contract offered to buyers seemed to guarantee the selected few, who were privileged to handle the goods of the Puritan Company, against all loss or damage which could result from slow sales or any other possible contingency. Of course, this sure thing could not be overlooked, and a contract was unhesitatingly signed up. The goods were promptly forwarded to the purchasers, and drafts were signed and returned to Iowa City, Iowa. The drafts read as follows:

“Puritan Mfg. Co. No. 3,591. Iowa City, Iowa, Mch. 29, 1904. Ten months after date pay to the order of the Puritan Mfg. Company, Iowa City, Iowa, ninety-five dollars (\$95.00), value received, and charge to the account of Puritan Mfg. Company, per ——. To Moore & Tabb, Houston, Miss. [Signed.]”

Customer's acceptance: “Accepted. Moore & Tabb. [Copy.] Accepted.”

Indorsements: “3|27|05. May 24, 1904. Pay Johnson County Savings Bank, Iowa City, Iowa, or order. Puritan Mfg. Co.”

“Puritan Mfg. Company. [Copy.] Iowa City, Iowa, Mch. 29, 1904. Ten months after date pay to the order of the Puritan Mfg. Company, at Iowa City, Iowa, ninety-five dollars (\$95.00), value received, and charge to account of Puritan Mfg. Company, per M ——. To Moore & Tabb, Houston, Miss.”

Customer's acceptance: “Accepted. Moore & Tabb, Accepted.”

After these goods had arrived, they were offered to the customers of Moore & Tabb, some of whom were unlucky enough to buy. Time disclosed that Moore & Tabb had been swindled. The goods of quality were brass and altogether worthless. In the meantime two payments had been made; but when the two, which are the foundation of this suit, were presented, appellants refused to pay. Therefore this suit. Upon the trial, appellants offered to show failure of consideration for the acceptances and fraud on the part of the sellers of the jewelry and drawers of the drafts sued on. The court below refused to permit this testimony to go to the jury. It was claimed by appellee, the Johnson County Savings Bank, of Iowa City, Iowa, that they were purchasers for value of the acceptances; that they knew nothing about the fraud, or failure of consideration; that they had bought this paper in good faith; that the acceptances were payable to bearer. Appellants claimed

the protection of our anticommercial statute; but the court could not see it that way, and appellants, feeling injured, appeal to this court.

Counsel for appellee cites in support of the action of the trial court the following decisions of this court, viz.: *Bank v. Wofford*, 71 Miss. 711, 14 South. 262; *Gillespie v. Oil Mill*, 76 Miss. 406, 24 South. 900; *National Bank v. Rhodes*, 96 Miss. 700, 51 South. 717. These cases are said to uphold the contention that the acceptances sued on are, in legal contemplation, payable to bearer. The first case cited, *Bank v. Wofford*, was a suit upon notes made by the defendants and payable to the order of themselves, and after being indorsed in blank by the maker fell into the hands of innocent purchasers for value. The court held that the notes were made payable to bearer by the indorsement in blank of the maker, the maker and payee being one and the same person; that this indorsement made them transferable by delivery, and therefore the defense of failure of consideration was not available. In *Gillespie v. Oil Mill*, W. A. Drenman drew a draft on the Oil Mill, payable to his own order, and indorsed it in blank. Of course, this draft became payable to bearer, because of the indorsement in blank by the maker. This indorsement in blank, when accepted, formed a part of the original note. The case of *Bank v. Rhodes*, *supra*, 96 Miss. 700, 51 South. 717, is not applicable to any phase of the case at bar. The note in question in that case was in its terms payable to bearer, and the maker undertook to avail himself of the defense that he did not intend to sign the note as it was drawn, and that he was misled into signing it.

Visibly the circuit judge misconceived the facts in the cases cited. In *Bank v. Wofford*, above referred to, the suit was against the drawer, or maker of paper payable to his own order, which had by him been indorsed in blank. In the instant case the acceptance which is the subject of this lawsuit was not indorsed in blank by any-

body. This case is clearly distinguishable from the cases relied upon by appellee. In those cases this court announced the law to be that notes or drafts payable to the order of the maker, or drawer, and indorsed in blank by the maker, or indorser, when negotiated, would be treated as commercial paper payable to bearer, because they were negotiable and the holder obtained title by the mere delivery.

The acceptances sued on here were not "indorsed in blank," as the term is understood in commerce and as defined by the law. An indorsement in blank is made by the mere writing of the indorser's name on the back of the bill, without mention of the name of any person in whose favor the indorsement is made. Indorsement in blank is contradistinguished from indorsement in full, or special indorsement, and they are all technical terms, well understood by the business world.

If the Puritan Manufacturing Company had merely written its corporate name across the back of the acceptances, it may be conceded for the purposes of this case that the acceptors could not avail themselves of the defenses afforded by our anticommercial statute. This court seems to have so held in *Gillespie v. Oil Mill*, *supra*. Let it be noted that the instrument construed in that case was indorsed in blank, while in the instant case the indorsement mentioned the name of the indorsee and directed the paper to be paid to the order of the indorsee named.

The special indorsee still owns the acceptances, and so long as they remain unindorsed by the Johnson County Savings Bank, who was plaintiff below, title to same will remain in the bank. A mere delivery to a third party of the acceptances with only the present indorsements would not carry ownership, and the party so holding them could not maintain a suit for their collection. When Moore & Tabb wrote their acceptance upon the face of the drafts, they agreed to pay them accord-

ing to their terms; and following this court in *Gillespie v. Oil Mill*, as construed by appellee, we may agree that the Puritan Manufacturing Company could have made the paper payable to bearer, in legal effect, by simply writing its name upon the back. This would have been an indorsement in blank. Fortunately, for appellants, this was not done. It is altogether probable that appellee is not the owner of the paper, but simply holds it for collection; but, however that may be, the special indorsement does not make the acceptances negotiable by delivery. They cannot be so negotiated, until they are indorsed by the Johnson County Savings Bank, and have never assumed the characteristics of notes payable to bearer.

The appellants should have been permitted to plead any defenses which they could have properly made against the Puritan Manufacturing Company.

It will be noted that we have adopted appellee's construction of *Gillespie v. Oil Mill*. We think, however, that the record shows that the drawer of the draft construed in that case indorsed it in blank before it was presented and accepted by the Oil Mill, which makes a different case from the one here, even if the indorsement of the Puritan Manufacturing Company could be termed an indorsement in blank.

Reversed and remanded.

DIXIE FIRE INSURANCE CO. *v.* R. L. BETTY.

[58 South. 705.]

1. LIBEL AND SLANDER. *Right of action. Defenses. Apology. Mitigation of damages. Code 1906, Sec. 10.*

In a suit for damages against a principal for defamatory words spoken by an agent while engaged in his master's business, an apology made by the principal not by reason of any promise expressed or implied, that it would constitute full reparation for the injury inflicted, cannot be pleaded in bar of the action, but is admissible in evidence and can be considered by the jury in mitigation of damages.

2. PRINCIPAL AND AGENT. *Code of 1906, Sec. 10.*

Code 1906, Sec. 10, by which certain words are made actionable has no application in a suit to hold a principal liable for words spoken by an agent unless possibly such words are spoken at the command of the principal.

APPEAL from the circuit court of Clay county.

HON. T. B. CARROLL, Judge.

Suit by R. L. Betty against the Dixie Fire Insurance Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

McLaurin, Armstead & Brien, for appellant.

The letter of November 30, 1909, tendering an apology both to Mr. McGee and Mr. Betty through Mr. McGee from Mr. Powers who had been informed from Betty's office of the actual condition of affairs, was an absolute defense to this suit and the court declined an instruction on that idea.

In 18 Am. & Eng. Ency. Law., p. 1075 (Libel & Slander), it is said:

"But it will be a good defense to an action if there is an agreement between the parties to accept the publi-

cation of mutual apologies and the apologies are afterwards published.”

But there is no way in this case for the court to undertake to determine to which count in the amended declaration this verdict must be ascribed. As said by the supreme court of Mississippi in the *Abrams Case*, *supra*, 84 Miss., whether the verdict was predicated on the first count of the amended declaration wherein it is alleged that these words were spoken by Powers, the special agent, with a view to insult the plaintiff Betty, and lead him to do violence and breach of the peace, or whether it was ascribed to the second count in the declaration, a common law action for slander.

We insist that the first count in the declaration predicated on Sec. 10 of the Code of 1906 of actionable words, is entirely “personal” and directed against the person speaking the words, and under no circumstances could such a suit be brought against the insurance company under the actionable word statute for language spoken by any alleged agent.

The court will find this contention fully discussed in the following authorities: *Manufacturing Co. v. Taylor*, 124 A. S. R. 90 (150 Ala. 574), (43 South. 210); 13 Cooley on Torts, p. 124; Ency. of Pl. & Pr., p. 30.

This actionable word statute, when considered in connection with its history, demonstrates beyond all question that it is entirely “personal” from the fact that it is known and styled as the antidueling statute, and passed June 13, 1822, and known as the “Act to suppress dueling.” See *Crawford v. Melton*, 12 Smedes & Marshall, 328.

Of course, when considered in the light of an act to suppress dueling, it necessarily means to prevent personal difficulties, and is an act directed against the person speaking the words. This is further shown from the act, wherein it provides that a plea, exception or demurrer shall not be sustained to preclude a jury from

passing thereon who are the sole judges of the damages sustained.

Now, in the annotations under this chapter of the Code of 1906, the court will see that the truth of the words is not a defense; that they were spoken out of the presence of the plaintiff is not a defense; therefore the defenses are not the same as the common law action of slander, and it clearly appears that it is a distinct and separate cause of action, added onto this common law action of slander, which is not permissible, we respectfully submit, and in permitting the case to go to the jury on the merits under these two counts in the amended declaration, it is impossible to determine under the instruction of the court, to which count in the declaration, as said in the *Abrams Case*, *supra*, must be ascribed the verdict; therefore it is erroneous.

We respectfully submit that the court erred, both on the pleading in this case, which we have just discussed first, and next on the merits of the case in failing to sustain the motion to exclude the testimony or to grant a peremptory instruction at the close of the testimony, for all of which this case should be reversed.

J. J. McCellan, for appellee.

No brief of counsel found in the record.

Argued orally by *A. A. Armstead*, for appellant.

Argued orally by *J. J. McCellan*, for appellee.

SMITH, J., delivered the opinion of the court.

Appellee recovered in the court below damages alleged to have been sustained by him because of certain defamatory words alleged to have been spoken of him by a servant of appellant while in the discharge of his master's business. Upon ascertaining that these words had been spoken of him, appellee wrote to appellant requesting an apology, and that an explanation be made

to the person to whom the words had been spoken, which request was complied with by the agent of appellant alleged to have spoken the words. This apology was not made by reason of any promise, express or implied, that it would constitute full reparation for the injury inflicted, and consequently the court below properly held that it could not be pleaded in bar of the action, but was admissible in evidence, and could be considered by the jury in mitigation of damages.

Over the objection of appellant, appellee was permitted to amend his declaration by adding a count predicated on Sec. 10 of the Code of 1906, by which certain words are made actionable. In so doing the court committed fatal error. This section has no application in a suit to hold a principal liable for words spoken by an agent, unless possibly in a case where such words were spoken at the command of the principal, as to which we express no opinion. Its language, together with the fact that its first appearance in our statutes was as Sec. 9 of the "Act to suppress dueling," passed June 13, 1822 (Rev. Code of Laws 1824, Ch. 50), demonstrates that its enactment was for the purpose of preventing personal difficulties, and that, consequently, it applies only to persons liable to become involved in such a difficulty by reason of having referred to another in words of the character therein mentioned.

Reversed and remanded.

MRS. N. P. PARDUE v. DAVE ARDIS.

[58 South. 769.]

STATUTES OF FRAUDS. *Code 1906, Sec. 4775. Contracts in consideration of marriage.*

An oral agreement by a prospective husband to renounce his interest in the realty of his prospective bride in consideration of marriage is void under Code 1906, Sec. 4775.

APPEAL from the chancery court of Tishomingo county.

HON. J. Q. ROBINS, Chancellor.

Suit by Dave Ardis against Mrs. N. P. Pardue. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

W. J. Lamb, for appellant.

We contend that the contract made in contemplation of marriage in this case was not void under par. B, of Sec. 4775, which says:

“Any agreement made upon consideration of marriage, mutual promises of marriage excepted, are void under the statute of frauds unless in writing.”

The statute of frauds does not apply for the reason that it does not apply to executed contracts; and, while this agreement was made in contemplation of marriage between the parties, yet upon a consummation of the marriage it became an executed contract and the statute of frauds does not apply.

“This statute has relation alone to executory contracts, and can never apply to contracts which have been fully executed, for the reason that such contracts as the latter can never be made the foundation of an action, unless they should be connected with some collateral matter. It may be true that this new arrangement could

not be enforced, if it were merely executory; but this is not the question." *Moore v. McAllister*, 34 Miss. 504.

"It is well settled that the statute of frauds applies only to executory contracts and not to agreements which have been completely executed and performed on both sides. And if a contract is within the statute in one particular only, but as to that particular has been completely carried out by both parties, the statute does not apply." 29 Am. & Eng. Ency. Law., p. 828; *Gorden v. Tweedy*, 71 Ala. 202; *Lagerfelt v. McKie*, 100 Ala. 430; *Morgan v. Battle*, 95 Ga. 663; *Amsinck v. Insurance Co.*, 129 Mass. 185.

Again, "since the statute of frauds does not declare parol contracts void, but merely provides that no action may be maintained thereon, such contract when fully performed by both parties is not within the statute, but is valid as against the world notwithstanding the statute. So such a contract may be taken out of the statute by part performance by the party seeking to enforce the contract." 19 Am. & Eng. Ency. Law., p. 1236; *Andrews v. Jones*, 10 Ala. 400; *Hussey v. Castle*, 41 Cal. 239; *Houghton v. Houghton*, 14 Ind. 505; *Bradley v. Sadler*, 54 Ga. 681.

Again, "where an oral contract unenforceable by reason of the statute of frauds has been entirely performed, the rights of the parties are no longer affected by the statute, and it is immaterial that either party might have refused to perform." 20 Cyc. 302.

"There are many cases in which oral contracts have been performed after marriage, and of these it may be said that no gift or other executed transaction is to be defeated because made or carried out in pursuance of an oral antenuptial contract. Antenuptial contracts that the wife's property should remain her own after marriage have been held to be executed if the husband has treated the property as his wife's and has allowed her to retain its management and control." 20 Cyc. 304.

This court held in the case of *Stein v. Fitzpatrick*, 84 Miss. 63, that: "An agreement made after a contract of marriage has become binding is not within the statute of frauds, as being upon the consideration of marriage, although it is made in reference to marriage."

The contract having been fully executed when this marriage was performed, then the statute of frauds cannot apply.

J. M. Boone, for appellee.

Our contention is that the only construction of the language set up in the defendant's answer in the court below is that it sets up a contract in consideration of marriage; it was a complete and full statement that this contract was upon the consideration of marriage, and that Elizabeth (Adams) Ardis would not have married the appellee unless he had agreed to relase all claims to her property; and we say ther: that it was void under Sec. 4775 (b) of the Mississippi Code of 1906.

This court in the case of *Steen v. Kirkpatrick*, 84 Miss. 67, gives a clear and unequivocal annunciation of the law on this subject, and sustains the action of the court below in this case. It cannot be contended, under the language of the answer of the defendant, that the contract was made simply in contemplation of marriage after the actual promise to marry had been made and become binding, for the answer itself expressly alleges that—"but for this agreement so made and entered into between Dave Ardis and her mother, her mother would never have married this complainant." A contract in consideration of marriage could not be more clearly stated than this. *Brown on Statute of Frauds*, Secs. 215 and 215 (b); *Reed on Statute of Frauds*, Sec. 173; *Rainbolt v. East*, 56 Ind. 538, 26 Am. Rep. 40.

This contract is void, under section 4775 (c), because it was an oral promise before marriage to settle the wife's property upon herself. 1 *Reed on Statute of Frauds*, Sec. 173, p. 282.

The appellant contended in the court below that although this agreement was void under the statute of frauds, it had been completed, and, therefore, was valid and binding. The only thing in the answer of the appellant in the court below showing any performance whatever of this contract on the part of Dave Ardis, is that he, appellee moved off of the land. The court below, as we think clearly and correctly, held that the only way for Dave Ardis to perform this contract would be for him to execute and deliver a deed to the appellant, Mrs. N. P. Pardue, of his interests in the said land which had descended to him at the death of his wife, the mother of appellant.

In the case of *Fisher v. Kuhn*, 54 Miss. 483, our court uses this language: "It has long been the settled doctrine of this court not to accept a part performance, or any other thing, as an exception to take the case out of the statute."

And this case was referred to an authority on the same subject by 1 Delvin on Deeds, Sec. 138, p. 128. And to the same effect is the case of *Beaman v. Buck* (Miss.), 9 S. & M. 210. In the case of *Box v. Standord*, 13 S. & M. 95, the court uses this language: "It also alleges actual part performance to take it out of the statute of frauds. These last may be laid out of view at once, because it is now the settled doctrine of this court that no exceptions of that character will be ingrafted upon the statute."

The same principle strictly adhered to in the case of changed condition by marriage, should not be sufficient to require the specific performance, yet he admits it to be thoroughly and firmly settled that mere marriage will not be sufficient. Judge Story says: "The subsequent marriage is not deemed a part performance of taking the case out of the statute; contrary, the rule which prevails in other cases of contract; in this respect it is always treated as a peculiar case standing on its own ground." 1 Story's Eq. Jur., p. 768.

While it is true that the chancery court applies the doctrine of equitable estoppel and requires specific performance by the other party where the party asking relief upon the faithful promise has been induced to make expenditures or change of situation with regard to the subject-matter of the promise on the supposition that the contract would be carried out, yet the contract based on a consideration of marriage is not governed by the same rules of general equity jurisdiction; and the cases found in the books where such contracts have been required to be performed are generally where the party has been guilty of actual fraud in the procurement of the contract, or actual fraud in inducing the party to the actual performance of marriage; but no exception has ever been ingrafted on our statute of frauds by our own court in cases similar to the one above.

In *Steen v. Kirkpatrick*, *supra*, our court seems clearly to hold that even where the contract was made in contemplation of marriage, and not upon consideration of marriage, that a parol contract as to land would be void as the last sentence in the opinion in this case is as follows, to wit: "Of course, the prenuptial parol contract would not be enforced as to real estate."

A parol contract, required by the statute of frauds to be in writing, made in consideration of marriage, cannot be enforced even if the marriage be performed. 26 Am. & Eng. Enc. Law (2 Ed.), 90; *Washington v. Soria*, 73 Miss. 673, in which the court uses this language: "It has been uniformly held that a part performance is not sufficient to withdraw the case from the statute."

Cook, J., delivered the opinion of the court.

Dave Ardis, the appellee, filed a bill in the chancery court of Tishomingo county, asking for the partition of certain lands between him and the appellant. The bill charges that the wife of the appellee, who was also the

mother of appellant by a former marriage, died seised and possessed of certain lands described in the bill, leaving appellant and appellee as her sole heirs at law. Appellant answered this bill, and denied that appellee had any interest in the lands described, saying: "Before the complainant, Dave Ardis, and her mother married, and before the mother would agree to marry the said complainant, she, the said Elizabeth Ardis, and the said Dave Ardis, complainant, had an agreement respecting the property which belonged to each of them, and it was agreed by and between the said Dave Ardis and the mother of your defendant, that if the mother of your defendant, Elizabeth Adams, would marry the said complainant, that he, Dave Ardis, would claim no right or interest in either the real estate or personal property belonging to the mother of your defendant which he would otherwise have under the laws of the state of Mississippi, and that he would claim nothing either from the real estate or personal property belonging to her mother, Elizabeth Ardis, which the law would give him as her husband. It was further agreed between them that, in the event of her death during the lifetime of the said complainant, the said complainant would take what personal property belonged to him, and move off the land belonging to the mother of your defendant, and surrender the same to your defendant as the heir at law of the said Elizabeth Ardis; that, but for this agreement so made and entered into between Dave Ardis and her mother, her mother would never have married this complainant." The case was set down for hearing upon the insufficiency in law of the answer to the bill. The chancellor held that the contract set up in the answer, being an oral contract, was void under Sec. 4775 (b) of the Mississippi Code of 1906, and therefore sustained the exceptions to the answer.

We agree with the chancellor, and the case is affirmed.

Affirmed.

BARATARIA CANNING CO. v. STATE EX REL.

[58 South. 769.]

1. LICENSES. *Commerce. Privilege Tax. Statutes. Constitution United States, Art. 1, Secs. 8-10. Constitution Miss., Sec. 112. Code 1906, Secs. 3497-3498. Laws 1908, Ch. 192.*

Code 1906, Sec. 3498, as amended by Laws 1908, Ch. 192, providing that in addition to the privilege license imposed by Sec. 3497, Code 1906, which imposes a tax on canning factories, there shall be paid a tax fee of three cents per barrel upon all oysters canned and packed in and all oysters shipped raw in or from this state, etc., provides a method for the collection of an additional privilege tax to that imposed in section 3497, and the whole tax must be paid by the local party engaged in taking or canning oysters in the state or by the local dealers selling or shipping oysters, as a privilege tax for conducting the business in this state, and so construed the statute does not interfere with interstate commerce, in violation of the Constitution of the United States, Art. 1, Sec. 8, nor impose duties on imports or exports in violation of Art. 1, Sec. 10, of that Constitution, nor does it destroy the equality and uniformity of the taxation laws in violation of the Constitution of 1890, Sec. 112.

2. SAME.

The constitutional requirement as to uniformity of taxation has no reference to taxation of occupations.

APPEAL from the circuit court of Harrison county.

HON. GEO. S. DODDS, Special Judge.

Suit by the state, on the relation of the attorney-general and the board of oyster commissioners, against the Barataria Canning Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Louis Goldman, for appellant.

It is held by your honors that this statute embraces the oysters taken from other states; we submit that it is

unconstitutional in that it is in violation of Art. 1, Sec. 8 of the Constitution of the United States which vests in Congress exclusive power to regulate commerce between the states, and of Art. 1, Sec. 10, which prohibits any state, without consent of Congress, from levying any duties upon imports or exports except such as are absolutely necessary for executing its inspection laws.

In presenting this proposition our search for authority has shown no clearer discussion of the issue than the recent case of *D. E. Foote & Co. v. Clagett* reported in 81 Atl. 511, and authorities therein cited. We direct the attention of the court to the fact that this is a Maryland case construing a statute similar to ours and where the oyster industry flourished and is a subject of much contention and litigation. The case before us, in our opinion, is stronger because it is not even contended here that this tax is for inspection purposes, whereas a part of the tax levied in the Foote case was for that purpose.

The first proposition to be considered is whether congress is vested with the exclusive right to regulate commerce. In *Gibbons v. Ogden*, 8 Wheat. 1, 6 L. Ed. 23, it was declared that this power comprehends every species of commercial intercourse among the several states, and that the grant of power leaves nothing for the state to act upon. See also *Phil. & Reading Co. v. Pennsylvania*, 15 Wall. 232.

Having determined that congress alone can deal with the subject of commerce between the states, we approach the question of importation with the right to dispose of the article imported. In *Brown v. Maryland*, 12 Wheat. 419, the right to import comprehended the right to sell. It was expressly held that the power to import was complete and there was no limitation thereof. Also 7 How. 416, this question of the sale of the imported article without restriction was passed upon.

In *Railroad Co. v. Pennsylvania*, 15 Wall. 276, a tax upon coal brought from another state was held to be

tax on commerce and therefore unconstitutional and void.

It will be remembered that the statute which is before us for discussion applies to the oysters that are brought from another state into our state and the tax would be on a sale thereof.

The Maryland court in 81 Atl. 511, approving the decision rendered in 15 Wall. 276, held it to be analogous to the oyster statute of 1910 of the state of Maryland, similar to ours and construed that act as unconstitutional. As set forth in Art. 1, Sec. 10 of the Constitution of the United States, "no tax can be laid by a state except such as may be absolutely necessary for executing its inspection laws."

The act before us clearly shows that this tax is not for inspection purposes. It is a tax that falls due immediately on receipt by the packer of the oysters from another state. It surely could not be held that the only way he could avoid the tax would be by consuming the oysters himself. There could be no purpose in importing the oyster except to have it packed or canned or sold.

The authorities here presented, if this act is to be held as embracing from another state, to our mind, decide its unconstitutionality; but it is earnestly submitted that this statute never contemplated oysters from another state; by its terms, it does not include them, and by no stretch of the imagination could it be stated that to embarrass the importation of oysters, would assist in the production or conservation of the oysters of this state as evidently contemplated by this and other statutes heretofore enacted.

D. M. Graham, for appellees.

It seems to me that this section 3498, which lays the tax question, is not susceptible of any other construction than that the tax was intended to be laid on all oysters canned and packed in this state. The court will not

construe a statute so as to change its clear meaning, and the object of construing a statute is to give it the intent of its framers, and this intent is to be found in the instrument itself. Indeed, there is no reason for a construction of this statute, and the language of it is perfectly clear and unambiguous.

In construing a section of the Constitution in *Frank Hawkins v. Board of Supervisors*, reported in 50 Miss. 735, the court at pages 758 and 759, uses the following language: "When a statute or section of the Constitution is expressed in general or limited terms, the law makers shall be intended to mean what they have plainly expressed, and consequently no room is left for construction. The object of construction applied to the Constitution is to give effect to the intent of its framers and the people in adopting it. This intent is to be found in the instrument itself."

But we do not have to rely on our construction of the intent of the legislature in laying the three cents tax per barrel, for we have authority from the State of Maryland, from which our own oyster laws were largely drafted, which decides both of appellant's contentions against it. In the case of *Applgarth v. The State*, reported in 42 Atl. 941, the identical question before the court here was decided. The law of Maryland required all canners to take out a license and give an estimate of the amount of the oysters that would be canned in one year, and required the canners to pay a tax of one dollar per thousand bushels for each thousand bushels of oysters packed and canned in excess of the amount named in the license issued to him. The defendant, Applegarth, in that case refused to pay on certain oysters that were packed by him in excess of the amount collected for by his license, on the ground that the oysters were brought from the waters of the state of Virginia, and that he was not liable for the tax; and the court stated the question there, which is the same question here, as follows:

“Does the fact that the appellant bought the oysters in the state of Virginia, and had them shipped to him from that state to the state of Maryland, exempt him from the payment of the license fee?”

We quote the following from the opinion in that case: “The appellant contended that the provisions of the act of 1894 relate solely to the oyster industry of the state of Maryland; and, further, that it was not the intention of the legislature to tax the canning of oysters caught in other waters than this state, or to place a burden on the packer for which he did not receive a corresponding benefit in the protection and the preservation of the article to be packed; and further it is contended that such a construction would be unreasonable and would impose an unjust burden, and if the legislature had so intended the tax to apply to other oysters than such as had been caught in Maryland waters, it would have said so in the words of the statute. But we fail to comprehend in what respect the Constitution has been violated by the provisions of this act, etc.”

The appellant contends that if the section itself does include oysters from another state, then it is violative of that part of Sec. 8 of the federal Constitution which provides that the congress shall have power “to regulate commerce with foreign nations and among the several states and with the Indian tribes.”

There is no doubt that congress has exclusive power to regulate commerce between the states, and that no state has a right to pass a law that interferes with the free intercourse of commerce between the states. The authorities are uniform on that proposition, both in the state and federal courts; but how the tax in question in any manner interferes with or places any burden on interstate commerce, I cannot see.

The tax in question is not laid on the oysters because they come from Alabama; indeed, the oysters could be brought from Alabama for some purpose and not be

liable to the tax in question at all; they were not liable for the tax when they were put aboard the schooner; they were not liable for the tax when they reached their point of destination at appellant's canning factory.

The case of *D. E. Foote & Co. v. Wm. B. Clagett*, reported in 81 Atl. 511, cited by appellant, is in no respect like the case at bar. In that case the inspectors were required to inspect the oysters, evidently while they were being transported, and the law there required every common carrier to furnish the oyster inspector a copy of his manifest, showing the number of barrels, etc., and the inspection there, and the collection of the tax, evidently did impede the free intercourse of commerce between the states. We quote this from the opinion in that case: "The packer is forbidden to buy oysters in course of transportation, except in the presence of the inspector, who himself certifies the amount of the tax, and thus the payment of the tax becomes a condition precedent to the sale, and consequently an impediment to the prosecution of that branch of commerce."

But in the case at bar no such impediment is placed on commerce. Oysters from Alabama are not interfered with by this inspector; no tax is placed on them because they come from Alabama, and, as before stated, the tax only attached after the oysters are canned and packed in this state.

MAYES, C. J., delivered the opinion of the court.

This suit is instituted by the state, on relation of the attorney general, for the purpose of recovering from the Barataria Canning Company the sum of two hundred eighty-four dollars and twenty-six cents claimed to be due the state by reason of the fact that the canning company bought and canned, in its factory situated in this state, some nine thousand barrels of oysters. In the declaration filed by the state it is stated that the oysters bought by the canning factory were taken from the wa-

ters of the state of Alabama, and brought into the city of Biloxi by the canning factory, and that the oysters so brought into the state, and bought by the canning company, were thereafter opened, shucked, and canned in the factory. The declaration then claims that by virtue of this fact the canning company became liable to pay to the state the sum of three cents per barrel on the above oysters, which aggregates the sum above named.

A demurrer was filed to the declaration, the grounds of demurrer being that under Sec. 3498 of the Code of 1906, as amended by Acts 1908, Ch. 192, the tax sought to be collected does not comprehend oysters shipped from another state into the state of Mississippi. The second cause of demurrer asserts that, if the statute does include oysters shipped from other states, it is unconstitutional and in violation of Art. 1, section 8, of the Constitution of the United States, vesting in congress the exclusive power to regulate commerce between the states. A third ground of demurrer is that, if the statute applies to shipments of oysters from other states, it also violates Art. 1, Sec. 10, of the Constitution of the United States, which prohibits any state from levying any duties upon imports or exports except such as are necessary for executing its inspection laws. A fourth ground of demurrer is that the statute violates Sec. 112 of the Constitution of the state of Mississippi, in that it destroys the equality and uniformity of the taxation laws. This demurrer was overruled, and, the defendant declining to plead further, judgment final was taken, from which judgment the canning company prosecutes an appeal.

The particular statute involved in this litigation is the amendment made by the Laws of 1908 to Sec. 3498 of the Code of 1906. This law is found in Ch. 192 of the Laws of 1908. The part of the above statute specifically involved is as follows: "In addition to the privilege license required by this chapter, a further tax fee of

three cents per barrel is hereby laid upon all oysters canned and packed in, and all oysters shipped raw in or from, this state, and on all oysters caught or taken from the public reefs or private bedding grounds for packing, canning, and for shipment or sale raw. . . . This tax shall be paid by the person, firm, or corporation packing or canning said oysters; and in case of oysters sold or shipped raw by the dealer selling or shipping the same; that is to say, by the first dealer who handles said oysters, and any oysters sold by any person who has purchased same from a dealer who has paid the license thereon, shall not again be taxed." It seems to us that the law is clear and consistent with the Constitution of the state and the United States. The above statute is a supplement to the privilege tax law; in fact, it is a privilege tax law itself. While in another place the act has fixed the tax at one hundred dollars for the privilege of conducting this business, it does not intend that one section of the statute shall fix the exact sum that must be paid for the privilege. The Laws of 1908 provide a method for the collection of an additional privilege tax to that named in section 3497, and the plan for ascertaining and fixing the additional amount of privilege tax is fixed by Ch. 192, section 3498, Laws of 1908. The tax is not imposed on the oysters, it is not imposed on the shipper from the foreign state into this state; but the whole tax is to be paid by the local person engaged in packing or canning the oysters in this state, or upon the local dealer selling or shipping the oysters, but the tax is imposed as a privilege tax for conducting the business in this state.

Counsel for appellant calls the court's attention to the case of *Footé & Co. v. Clagett*, 116 Md. 228, 81 Atl. 511. It is contended by counsel for appellant that the above case is directly in point and conclusive of this controversy, but we do not so read the case. The statute of Maryland, which was being reviewed by the court, was

very different from our statute. In the above case it is shown that the state of Maryland for the purpose of raising revenue, undertook by statute to impose a tax on oysters shipped from foreign states before they could be sold, and the Maryland court held that the statute was void under Art. 1, section 8, of the Constitution of the United States, prohibiting any state from levying any duties upon imports or exports, except such as are absolutely necessary for executing its inspection laws. One of the contentions in the above case was that the statute was only designed as an aid to the inspection laws of the state of Maryland, but the court held that although the act provided for an inspection of oysters, since it also imposed a charge of two cents per bushel on all oysters shipped from foreign states, the act showed on its face that it was a revenue measure, and because of this held the act void as in conflict with that article and section of the federal Constitution above referred to. But the act of 1908 of this state is a very different law. The tax in this state is levied on the person, firm, or corporation packing or canning the oysters in this state after they have reached here and been sold by the foreign owner. The same is true of the privilege tax placed upon a dealer selling or shipping raw oysters. The act of 1908 does not contemplate that any tax shall be imposed upon any person importing or selling oysters in this state. Such person is not prohibited by the act from so doing. In other words, a party living in Alabama may himself ship into this state as many oysters as he desires and sell same, and, unless he localizes himself as a dealer or canner of oysters, no tax is imposed on him by the act. The tax is imposed upon the person who buys and cans them in this state as a privilege for conducting that business. And, again, the tax is imposed upon the local dealer in this state for the privilege of conducting that business in this state. A canning factory, or a dealer, may purchase all the oysters they desire from any per-

son in any other state without liability to this tax, unless the above person cans and packs the oysters after they buy them, or unless they sell or ship them as a dealer.

This act violates no section of the Constitution of the state or United States. The case of *Applegarth v. State*, 89 Md. 140, 42 Atl. 941, is a case directly in point. It appears from the above case that the state of Maryland had a law very similar to the law of this state. Applegarth was indicted in Maryland for a violation of the act. The state introduced testimony showing that Applegarth was engaged in the packing and canning of oysters in the city of Baltimore. The state then proved that he had failed to pay the tax of one dollar per thousand on each one thousand barrels of oysters packed and canned in excess of the amount named in the license issued to him. In defense, Applegarth offered evidence showing that the oysters in question were purchased by him in the state of Virginia, and shipped to him from that state, and that they were taken from the waters of that state. This evidence on the part of Applegarth was objected to by the state, and the court sustained the objection, and refused to admit the evidence. The opinion of the court in the above case so thoroughly states the contention in the case now on trial before this court that we can do no better than to quote it with approval. In the above case the court says: "Does the fact that the appellant bought the oysters in the state of Virginia, and had them shipped to him from that state to the state of Maryland, exempt him from the payment of the license fee? The appellant contends that the provisions of the act of 1894 relate solely to the oyster industry of the state of Maryland; and further, that it was not the intention of the legislature to tax the canning of oysters caught in other states by this statute, or to place a burden on the packer for which he did not receive a corresponding benefit in the protection and preservation of

an article to be packed; and, further, it is contended that such a construction would be unreasonable and would impose an unjust burden, and, if the legislature had so intended the tax to apply to other oysters than such as have been caught in Maryland waters, it would have said so in the words of the statute. But we fail to comprehend in what respect the Constitution has been violated by the provisions of this act, unless it be true that every license issued to a merchant is unconstitutional, because he may sell goods that were made in, and shipped from, some other state. In other words, on whatever stock he purchased outside of the state he would not be required to pay any license. To sanction the contention of the appellant would be to grant immunity to the citizens of the state of Virginia by releasing them from taking out certain licenses which the citizens of Maryland are under the act of 1894 required to obtain. We know of no act ever passed by the legislature of this state which was intended to confer benefits upon other states, but which denied to this state equal benefits. Mr. Justice Field, delivering the opinion of the court in the case of *Webber v. Virginia*, 103 U. S. 350 [26 L. Ed. 565], says: "No one questions the general power of the state to require licenses for the various pursuits and occupations conducted within her limits, and to fix their amount as she chooses." And again from the same case: "A state may require a license for the sale of sewing machines, although the machines are patented under the laws of the United States, where there is no discrimination against machines outside the state." Mr. Justice Boyd, delivering the opinion of this court in the case of *State v. Applegarth*, 81 Md. 296, 297, 31 Atl. 961, 28 L. R. A. 812, says: "The appellees were indicted for engaging in the business of packing and canning, for sale and transportation, oysters taken in the waters of this state, without obtaining from the state a license therefor. The prosecution is based on Secs. 66, 67, Art. 72, of the Code of

Public General Laws, as amended by Ch. 380 of the Laws of 1894. It is contended on behalf of the appellees, that these sections are (1) in conflict with the Constitution of this state, because the license provided for is an arbitrary and unequal tax, contrary to the fifteenth article of the Bill of Rights, and not a lawful exercise of the police power of the state; and (2) that they are a regulation of interstate commerce, in violation of the Constitution of the United States. . . . The privilege of carrying on the business of packing and canning oysters is made, by this law, to depend upon the taking out of a license, and we do not think the provisions of the state Constitution looking to equality and uniformity in taxation are thereby violated. It is said in Tied. Lim. 282, that 'the most common objection raised to the enforcement of a license tax is that it offends the constitutional provision which requires uniformity of taxation, since the determination of the sum that shall be required of each trade or occupation must necessarily, in some degree, be arbitrary, and the amount demanded more or less irregular. But the courts have generally held that the constitutional requirement as to uniformity of taxation had no reference to taxation of occupation.' The right to require the payment of license fees for the privilege of carrying on business of different kinds has been recognized for many years in this state, and the license fees required to be paid have been fixed, in the discretion of the legislature, according to circumstances and the character of the business."

Affirmed.

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REVISED RULES
OF THE
SUPREME COURT OF MISSISSIPPI
REVISED, ADOPTED AND PROMULGATED
OCTOBER 7TH, 1912

SUPREME COURT DISTRICTS

First District—Attalla, Bolivar, Hinds, Holmes, Issaquena, Kemper, Lauderdale, Leake, Madison, Neshoba, Newton, Noxubee, Rankin, Scott, Sharkey, Sunflower, Warren, Washington, Winston, Yazoo.

Second District—Adams, Amite, Claiborne, Clarke, Copiah, Covington, Forrest, Franklin, George, Greene, Hancock, Harrison, Jackson, Jasper, Jefferson, Jefferson Davis, Jones, Lamar, Lawrence, Lincoln, Marion, Pearl River, Perry, Pike, Simpson, Smith, Wayne and Wilkinson.

Third District—Alcorn, Benton, Calhoun, Carroll, Chickasaw, Choctaw, Clay, Coahoma, DeSoto, Grenada, Itawamba, Lafayette, Lee, Leflore, Lowndes, Marshall, Monroe, Montgomery, Oktibbeha, Panola, Pontotoc, Prentiss, Quitman, Tallahatchie, Tate, Tippah, Tishomingo, Tunica, Union, Webster, and Yalobusha.

Ordered that the following rules be adopted for the government of this Court, superseding all others heretofore in force and not hereby re-adopted.

RULE 1. Every transcript of record brought to this Court shall be distinctly and plainly *printed*, or *typewritten*; and if typewritten, on paper not less than eight, nor more than eight and one-half inches wide and fourteen inches long, on *one side* of every leaf; and each page shall be numbered at the bottom, at or near the center, and there shall be a blank margin at the top of not less than one inch, the paper to weigh not less than fourteen pounds to the ream. Transcripts may be typewritten on linen paper, to weigh not less than eight pounds to one thousand sheets, and *must be double-spaced*.

No *carbon* or other *duplicates*, nor transcripts type-written with copying ink will be received. Each record shall be prefaced by a suitable index, and each typewritten transcript shall be securely bound in non-flexible pasteboard covers, with marble sides, in volumes of about an equal number of pages, not to exceed in any case two hundred and fifty pages in a volume, for the payment of which binding the appellant will be allowed sixty cents per volume to be taxed with the costs. The appellant may cause the transcript to be bound as above described, or he may, at the time of taking his appeal, deposit with the clerk of the court from which the appeal is taken, a binding fee of sixty cents per volume of two hundred and fifty pages.

In such cases the clerk shall transmit the unbound transcript, with the binding fee, to the clerk of this Court. Transcripts shall *not be*

folded, but may be rolled for transmission, if not bound as required; and if not bound, the sheets shall not be fastened together.

The clerk of this Court shall not accept any record made up in violation of these rules, and for the making and filing of such a record no clerk shall be allowed any fees whatever.

RULE 2.—Transcript—What to Contain. A transcript shall not contain any part of the case except the pleadings, evidence, instructions, bills of exceptions and the order, judgment or decree appealed from, unless the appellant shall, by writing, request other matters specified to be embraced in the transcript, a copy of which request shall be annexed to the transcript; and exhibits to declarations, bills, answers, deposition, etc., shall immediately follow the particular plea or deposition, first referring to them, and shall be copied but once. The several answers of witnesses as made in depositions shall each follow consecutively the particular interrogatory to which they are responsive; and no commission to examine a witness, nor certificate of a commissioner to a deposition, nor any proceedings to obtain such commission shall be inserted in any transcript except where a question as to the sufficiency or legality thereof appears from the record to have been decided; and no fee shall be allowed for anything besides those matters required to be embraced in the transcript.

RULE 3.—Agreed Transcript. By agreement of parties or their attorneys, made in writing, and attested by the Clerk of the Court in which any case may be pending or record existing (which agreement shall be filed and made a part of the transcript of such record), such parts of the record and proceedings as shall be agreed shall constitute the transcript of the record to be brought to this Court; and shall be certified as such and be considered a full transcript in this Court for the consideration and final adjudication of the cause here.

RULE 4.—Suggestion of Diminution of Record. If a record be imperfect, diminution may be suggested by either party, and a writ of certiorari will be awarded, provided that if the filing of such a suggestion has been unnecessarily delayed to the prejudice of the opposite party, the writ will be awarded only upon such terms as the Court may impose, or it may be refused altogether.

RULE 5.—Records and Papers—How Filed. No record or other paper shall be considered as filed until so marked by the Clerk—process of this Court excepted—and the Clerk shall indorse the date of filing.

RULE 6.—Assignment of Errors. 1. On or before the return day of the district from which a case comes, the appellant shall file an assignment of errors which shall set out *separately* and *particularly* each error asserted and intended to be urged, to which shall be appended a certificate that a copy thereof has been delivered or mailed to opposing counsel.

2. No error not distinctly assigned shall be argued by counsel, except upon request of the Court, but the Court may at its option, notice a plain error not assigned or distinctly specified.

3. The right of an appellant to obtain a review in this Court of any ruling made in the trial Court shall not depend in any wise upon his having filed in such Court a motion for a new trial, or if such motion has been filed upon the grounds thereof being distinctly specified.

RULE 7.—Briefs. (1) Appellant's brief shall be filed not later than twelve days before the case is called for argument, and appellee's not later than five days before said time, and any rejoinder brief shall

be filed not later than the day on which the argument is heard. This rule shall not apply where counsel have entered into a written agreement relative to the filing of briefs, but no brief shall be filed after the case has been submitted, except by leave of Court first obtained.

(2) The contents of briefs are for the determination of counsel, but those briefs are of most assistance to the Court in which there precedes the argument of counsel; first, a concise statement of the case so far as essential to an understanding of the questions presented for determination, with specific references to the precise places in the record where the points discussed may be found; and, second, a "brief of the argument," which should consist of the points or propositions of law, or fact to be discussed with the citation of authorities relied upon in their support.

(3) Briefs shall be *typewritten* or *printed*; and if typewritten shall be in *black, non-copying ink*, doublespaced, on white paper, without the name of any person or advertising matter thereon. There shall be appended thereto a certificate that a copy of it has been delivered or mailed to opposing counsel; and if mailed, the certificate to appellant's original brief must contain the further statement that it was done not later than two days before the filing thereof.

(4) Any brief containing language showing disrespect or contempt for the trial court will be stricken from the files, and this Court will take such further action relative thereto as it may deem proper.

RULE 8.—Court Days. The Court will convene on each Monday and Tuesday during the term at 9:30 a. m., remaining in session on Tuesday during the forenoon only.

RULE 9.—Call and Order of Docket. (1) On the return day for each district the Court will commence the calling of civil cases for argument and submission in the order in which they stand on the docket, and proceed on each Monday and forenoon of Tuesday during the time allotted to the docket of that district in the same order, except when engaged in calling the criminal docket, or as may be provided by special order. A case will be passed and placed at the foot of the docket upon request of the parties thereto, or their counsel, made in writing one week prior to the day on which the case is reached on a regular call, but no case will be passed when a request so to do is made for the first time on the day on which the case is due to be called, except upon good cause shown.

(2) Twenty cases only shall be considered as liable to be called each week, but on the assembling of the Court on each Monday the entire number of such twenty cases will be called with a view to the disposition of such of them as are not to be argued; provided that the Court, at its option, on any day subsequent to the commencing of the call of the docket, may order any case submitted wherein counsel have agreed in writing that this may be done.

(3) Except as herein provided and under special and peculiar circumstances, to be shown to the Court, no case other than one which is a preference case by law, will be taken up out of its order on the docket, or set down for any particular day.

(4) No agreement to pass a case without placing it at the foot of the docket will be recognized as binding upon the Court.

(5) The clerk shall, one week before the time set for the calling of the docket for each district, mail to every lawyer or firm of lawyers interested therein, a copy of the docket for that district so far as the same can then be made up. On each Wednesday during the term of Court he shall mail each lawyer or firm of lawyers interested therein a list of the cases to be called for submission on the following Monday;

but the failure of an attorney to receive this list shall not entitle him to have a case in which he is of counsel passed or re-instated after submission.

RULE 10.—Argument of Counsel. Only two counsel will be heard for each party on the argument of a case. The time allowed therefor will be determined by the Court in each case, and may be apportioned between the counsel on the same side in their discretion, provided always that a fair opening of the case shall be made by the party having the opening and closing argument.

RULE 11.—No Reversal for Harmless Error. No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice.

RULE 12.—New Trial as to Part. In case a judgment is reversed, and a new trial granted, it shall be only a new trial of the question or questions with respect to which the verdict or decision is found to be wrong, if separable.

RULE 13.—New Trial as to Damages Only. When a judgment is reversed and a new trial ordered because the damages are excessive or inadequate, and for no other reason, such judgment shall be set aside only in respect of damages and shall stand good in all other respects.

RULE 14.—Suggestion of Error. (1) The losing party may within fifteen days after a judgment is rendered in this Court file a written suggestion of error or law or fact therein, and the Court will take such action thereon as it may deem proper. Upon good cause shown this time may be extended to thirty days; but an application for such an extension must be filed within the original fifteen days.

(2) An adjournment of Court less than fifteen days after the rendition of a judgment shall not preclude the filing of a suggestion of error therein, but the same may be filed with the clerk within the time prescribed for presenting such suggestion of error to the Court, whereupon all proceedings on the judgment shall be stayed until it shall be acted upon at the next session of the Court, unless a majority of the judges of the Court shall certify in writing to the clerk prior to the next term that they have considered the suggestion of error and have determined to overrule it; upon receipt of such certificate such proceedings shall be had as if a suggestion of error had not been filed.

(3) "No reply to a suggestion of error shall be filed, unless the court, by special rule, or otherwise, shall call therefor. But no suggestion of error will be sustained to the prejudice of the adverse party until he has been given an opportunity of replying thereto. After a suggestion of error has been sustained, or overruled, by the court no further suggestion of error shall be filed by any party."

(4) Any suggestion of error containing language showing disrespect or contempt for this Court will be stricken from the files, and the Court will take such further action relative thereto as it may deem proper.

RULE 15.—Papers Out of Office. The person through whose fault a record is not in the court room when the case is called for submission shall be fined the sum of twenty-five dollars.

RULE 16.—Motions. Every Saturday shall be motion day; and if counsel be not present, and have no briefs filed when their motions are regularly called, such motions shall be dismissed; and no motion once disposed of, or dismissed shall again be heard. No motion will be considered until the opposite party shall have had at least three full days' notice, by mailing, or delivery to such party a copy of same.

RULE 17.—Motion to Dismiss—When Waived. When a motion is made to dismiss, and counsel for the motion either withdraws it or suffers it to be dismissed for want of prosecution, it shall be considered a waiver of the defect on which the motion was based, unless it be so material that no judgment can be given.

RULE 18.—Dismissed Cause; How Reinstated. No cause that has been dismissed shall be reinstated without an affidavit setting forth probable error in the proceedings.

RULE 19.—Docket—How Called—Delay Cases. At each term of the Court the docket of each district shall be taken up in its order. But on regular motion-day, by motion entered for that purpose, causes may be submitted on a suggestion that they are brought here for delay, and if satisfied of the truth of such suggestion, the Court will take up such causes first of their district, and make proper disposition of them.

RULE 20.—Failure to Prosecute—Cause Dismissed. When any case shall be called for trial in its order, if no counsel appear and no brief be filed on behalf of the appellant, the cause shall be dismissed for want of prosecution.

RULE 21.—Calculations. When a party relies on an excess in the calculation of interest or damages as a reason for reversing a judgment, a true calculation shall be presented to the Court, in writing and figures, with a certificate by some counsellor not interested in the cause, that the calculation is correct; and no such error will be noticed unless so presented to the Court.

RULE 22.—Agreement of Counsel. No agreement between counsel will be regarded unless reduced to writing, and signed and filed by them.

RULE 23.—Authority of Counsel—When Required. On motion supported by affidavits, any counsel may be required to produce his authority, or show satisfactory evidence thereof, for prosecuting any appeal in this Court; and on failing to produce such authority, or furnish such evidence, the appeal may be dismissed.

RULE 24.—State Cases. The docket of criminal cases for the whole State shall be taken up on the second Monday after the Monday fixed by law for calling the docket for each district. Only cases in which transcripts of the record shall have been filed, shall be called, unless 60 days since the date of the certificate provided for by Section 70 of the Code of 1906 shall have expired, in which case they shall be called.

The Attorney General may at any time inform the Court of any case in which the time for filing the transcript has expired, and move for affirmance of the judgment; and nothing herein contained shall extend the time, when under the law, transcripts should be filed in this Court.

RULE 25.—When Appellee May Not Waive Time. After a case has been called on the docket, the appellee shall not be permitted to waive the time within which citation is required to be served, nor to enter his appearance for trial of the cause at that term.

RULE 26.—Attorneys Must Be Admitted to Practice. Attorneys at law who have not been admitted to practice in this Court, shall not be permitted to argue orally, or file briefs or *any paper* in any cause in this Court.

RULE 27.—Papers Not Filed After Submission. *The clerk shall not file with the papers of any cause any paper after the cause has been argued, or submitted, except by leave of the Court.*

RULE 28.—Original Papers—When Considered. Whenever it shall in the opinion of the Judge or Chancellor, be necessary or proper that original papers of any kind should be inspected in the Supreme Court, such Judge or Chancellor may make such rule or order for safe-keeping, transporting and return of such original papers as to him may seem proper; and such papers will be considered in connection with the transcript.

RULE 29.—Costs Paid by Appellant—When Mandate Retained. When costs are awarded in this Court against the appellee, and there shall have been a return of *nulla bona* to an execution against him, and the costs shall be paid by appellant, no mandate shall issue upon the application of the appellee, until he shall pay into the Court, for the use of appellant, the costs paid by him.

RULE 30.—Penalty for Violations of the Rules of This Court. Any litigant, who by himself or his counsel, fails to comply with any of the provisions of the foregoing rules, shall, on motion of the party aggrieved, be taxed with such proportion of the appeal costs as in the judgment of the Court may seem just and proper, in addition to any other penalty which may be provided by the rules.

RULE 31.—Remedial Writs. No application for supersedeas, or any other writ or remedial process mentioned in Section 992 of the Code of 1906, except in cases of greatest emergency, shall ever be acted on, in any case pending in any court, by any member of the Supreme Court, *ex parte*; but every such application, except in cases of greatest emergency, shall be accompanied by a certificate of written notice served on the opposite party, or his counsel, or some of them, at least three days before the hearing; and all such applications will be acted on only when both sides are represented at the hearing, or after such three days' notice, duly certified to as above.

RULE 32.—Rules May Be Suspended. These rules shall be considered as general rules for the government of the Court and the conducting of causes; and as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the Court in any case where it shall be manifest to the Court that a strict adherence to them will work surprise or injustice.

Instructions to Clerks of Circuit and Chancery Courts as to Making up Transcripts of Record on Appeal to This Court.

NOTE—The references are to sections of the Code of 1906, and clerks are requested to read these Rules as revised, very carefully, before making up their records in appeal cases.

I. In making up the transcript, copy first the minutes showing organization of the Court at the trial term, and in criminal cases, copy next the minutes showing organization of the court, grand jury, etc., at the term when indictment was found.

II. The order of time in which proceedings were had and papers filed should be preserved; except that the pleadings and orders of court should precede the testimony, and in appeals from chancery court the testimony should precede the final decree.

III. Every order of court, should, for convenience and certainty, be preceded by a statement giving the date—*day, month and year—on which it was entered.*

IV. The petition for appeal must be in writing (Sec. 41); must be marked by the clerk "filed," and must be dated; and, with the endorsements, must be copied in the transcript. (Sec. 42.)

V. In cases appealed from the circuit court, copy the petition for appeal, should there be any, after the bill of exceptions, and after the final decree, in cases appealed from the chancery court.

VI. No appeal can be had without bond or a deposit for costs, except as provided in Secs. 62, 63, 93, 94. The kind of bond required in each character of case is prescribed in Secs. 49 to 62 inclusive.

VII. Bail after conviction is regulated by Secs. 65, 66, 67 and 68; and a defendant out on bail must either give a cost bond or make the affidavit of inability prescribed in Sec. 62, or make a deposit as prescribed in Sec. 63.

VIII. The original of all bonds, except bail bonds in cases of misdemeanors, must be transmitted to the clerk of the Supreme Court; the clerks of the lower courts being required to keep copies. Sec. 69.

IX. When a deposit for costs has been made in lieu of a bond, the fact should be certified in the transcript. Sec. 77.

X. The original summons in appeal, or a certified copy of it, and the return thereon must be sent up to the Supreme Court. Sec. 73. And for convenience, should accompany the transcript.

XI. The certificate contemplated by Sec. 4921 should always be accompanied by a copy of the judgment or decree appealed from, and the appeal bond, if any has been given, in order that a proper judgment or decree may be entered here against the sureties, as well as the principals, in such bond. Such certificates should give the full name as disclosed by the record, of all parties, those who appealed, and those against whom the appeal was prayed.

XII. The Clerk of the Supreme Court is authorized to issue executions for the costs of transcripts, and other costs accrued on appeal (Sec. 3961); which includes costs for issuing and serving appeal process, taking bond, etc. He is required to withhold mandate until all such costs be paid. Sec. 4946. Such costs will be included in execution for appeal costs, to be issued as soon after decision of each

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case as practicable; and when collected, should be paid by the sheriff to the person to whom they may be due.

XIII. The binding fee, referred to in Rule 2 of the Court, should be charged as part of the transcript fee.

XIV. Clerks should make a statement on the transcripts of the amount of their fees for such transcripts, and whether or not they have been paid; otherwise such costs will not be taxed or collected by the Clerk of the Supreme Court. Sec. 78. Only fees incident to the appeal, i. e., for preparing transcript, approving bond, issuing summons, etc., should be included in such statement.

XV. The attention of circuit clerks is called to Sec. 70.

XVI. Rule 2 requires that every transcript shall be prefaced by a suitable index; and clerks are earnestly requested to precede the index with style of the case, court, county, and the name of presiding judge or chancellor; also amount or nature of judgment, and date of same.

XVII. Attorneys are requested to indorse the style of the case on all counsel papers, before presenting them to be filed.

XVIII. Clerks in sending up binding fees for transcripts should send postoffice money order, or express money order—no *personal check for less than 65 cents per volume* will be taken, as the banks charge exchange on all personal checks, and the clerk of this Court is required to pay the binder 60 cents net, cash.

GEO. C. MYERS, Clerk.

INDEX.

ACTIONS.

1. *Limitations by contract. Insurance. Code of 1906, Secs. 2575, 3126, 3127. Constitution 1890, Sec. 87.*

Code 1906, Sec. 2575, providing that conditions or stipulations in insurance contracts limiting the time within which suit may be brought thereon to less than one year, shall be void does not prevent such contractual limitation for a period of not less than one year. *Taylor v. Insurance Co.*, 480.

2. *Same.*

Code 1906, Sec. 3127, providing that the limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between the parties, etc., does not repeal or nullify Sec. 2575, in view of the facts that these two sections were adopted at the same time, are in different chapters and that Sec. 3126 in the same chapter as Sec. 3127 provides that chapter shall not apply to any suit which is limited by any statute to be brought within a shorter period than is prescribed in such chapter, and because repeals by implication are not favored by the courts. *Ib.*

3. *Constitution 1890, Sec. 87. Special or local laws. Limitation of actions.*

Constitution 1890, Sec. 87, prohibiting the enactment of special or local laws or the suspension of general laws, etc. is not violated by Sec. 2575, Code 1906, permitting insurance companies to make contracts limiting the time in which suits can be brought thereon to not less than one year. *Ib.*

4. *Municipal Corporations. Public improvements. Change of grade. Damages. Waiver.*

Where a property owner is required by a resolution of a municipality to construct a sidewalk in front of her property on a certain grade within twenty days, or show cause for her failure to do so, she did not by constructing such sidewalk waive her right to claim damages for being forced thereby to raise her lot and houses to conform to such grade and the fact that she waited for more than twenty days to construct such sidewalk makes no difference. *City of Jackson v. Muckenfuss*, 555.

ALLUVION.

ACTIONS—Continued.

5. *Declarations.*

A plaintiff cannot predicate his recovery on grounds not alleged in his declaration and it is not error for the court to refuse an instruction which does this. *Richards v. City Lumber Co.*, 678.

6. *Laws 1910, Ch. 135. Retroactive operation.*

Chapter 135, Laws 1910, providing that "in all actions hereafter brought" for personal injuries, contributory negligence shall not bar a recovery, is not retroactive. *Ib.*

7. *Constitutional Law. Vested rights.*

The legislature has no power to take away vested rights in order to create a cause of action out of an existing transaction for which there was at the time of its occurrence no remedy; nor can it destroy a valid defense to an action existing before the enactment of the statute. *Ib.*

8. *Damages. Nuisance. Successive recoveries.*

The erection of an embankment which causes the obstruction of the natural flow of water and causes damages to the land of another is a continuing nuisance for which successive recoveries can be had. *Rosamond v. Carroll County*, 701.

9. *Principal and agent. Code of 1906, Sec. 10.*

Code 1906, Sec. 10, by which certain words are made actionable has no application in a suit to hold a principal liable for words spoken by an agent unless possibly such words are spoken at the command of the principal. *Fire Insurance Co. v. Betty*, 880.

ALLUVION.

1. *Navigable waters. Title.*

The owner of land adjoining a navigable river owns the alluvion formed in front of his land, though such alluvion first commenced to form in front of adjoining property and extended later in front of his property. *Smith v. Leavenworth*, 238.

2. *Apportionment.*

The general rule for apportioning alluvion between coterminal land owners, is to give each such proportion of the new shore line as they possessed of the former shore line before the formation of the alluvion. This rule however is not absolute and there may be exceptional cases requiring the application of a different rule in order that justice may be done. *Ib.*

APPEAL AND ERROR.

APPEAL AND ERROR.

1. *Municipal ordinances. Appeal to circuit court.*

Where a criminal case is tried in a mayor's court for a violation of a municipal ordinance, it cannot be tried on appeal in the circuit court as a violation of the state law. *Thomas v. State*, 74.

2. *Same.*

In such case the proper disposition of the case in the supreme court is to reverse the judgment, and remand the case, to be proceeded with as a prosecution by the city. *Ib.*

3. *Criminal law. Trial. Argument of counsel.*

In a trial for murder where the district attorney was permitted over the objection of defendant to say to the jury, "If you bring in a verdict of manslaughter, the court does not have to sentence defendant to the penitentiary, but can fine her or send her to the county farm," it was reversible error. *Minor v. State*, 107.

4. *Criminal law. Instructions.*

Where accused was indicted for an assault and battery with intent to kill and murder and the evidence only showed an assault with intent to kill, it was harmless error for the court to instruct the jury that if they believed from the evidence beyond all reasonable doubt that defendant was guilty of assault with intent to kill and murder they should find him guilty as charged in the indictment, as under an indictment for an assault and battery with intent to kill and murder a conviction can be had for assault with intent to kill and murder. *Flowers v. State*, 108.

5. *Reversal.*

A conviction will not be reversed for an error not prejudicial to the party complaining. *Ib.*

6. *Criminal law. Character of accused. Particular acts.*

While a witness introduced as to the character of accused for peace or violence can testify as to his general reputation on that subject, it is error to compel him to testify as to the details of a number of independent fights, etc., in which it was claimed that defendant had been engaged. *Neal v. State*, 122.

7. *Supreme Court. Exceptions. Instructions. Stenographer's notes.*

Where a peremptory instruction was given marked and filed by the clerk, and no motion for a new trial was made, but an exception to the action of the court in granting

APPEAL AND ERROR.

APPEAL AND ERROR—Continued.

this instruction was taken at the time, it was given and in due course, a bill of exceptions consisting of the stenographer's notes, embodying all of the evidence was filed, it became a part of the record and was reviewable on appeal without a motion for a new trial. *McCorkle v. I. O. R. R. Co.*, 124.

8. Same.

In such case where the evidence in the case is made a part of the record by a bill of exceptions, it will be looked to by the court on appeal in order to determine the correctness of the lower court's ruling. *Ib.*

9. Appearance. Citation.

Where an appeal from a decree rendered in the third supreme court district was perfected by the filing of an appeal bond in July, and in October the appellees moved in the supreme court to docket and dismiss the appeal, such motion was overruled, as the docket of the third district is called on the first Monday of December, that day by virtue of Code of 1906, section 4906, being the return day for appeals from that district, and citation for appellees was unnecessary for by their motion to docket and dismiss the appeal they entered their appearance before the return day for appeals from that district. *McAllister v. Richardson*, 132.

10. Delay in prosecution. Dismissal.

Where the record in a cause had been filed in the supreme court and appellee's appearance had been entered more than ten days prior to the return day for an appeal there was no such delay in the prosecution of the cause after taking the appeal as will warrant a dismissal. *Ib.*

11. Justice of the peace. Answer of garnishee. Time of filing. Appeal. Code of 1906, sections 2345-2347.

Where a party was garnished in a justice of the peace court and failed to answer on the day required by section 2347, Code of 1906, and judgment was rendered against him in said court, he cannot on appeal to the circuit court for the first time make answer in that court to such garnishment over the objection of the garnishor. *Lumber & Mfg. Co. v. Mallett*, 135.

12. Same.

Where in such case the answer of the garnishee is filed without objection and remains on file for a long time the objection will be considered to have been waived. *Ib.*

APPEAL AND ERROR.

APPEAL AND ERROR—Continued.

13. *Instructions. Harmless error.*

Where a party to a suit obtains a judgment he cannot complain that the court refused to give him a peremptory instruction, for the jury have done what the party requested the court to peremptorily charge them to do. *New Orleans, M. & O. R. R. Co. v. Cole*, 173.

14. *Review. Harmless error.*

A party cannot complain of an erroneous instruction where instructions were given at his request embodying the same principle. *Ib.*

15. *Failure to file transcript. Dismissal. Code of 1906, sections 4902-4906.*

Where a transcript should have been filed in the supreme court on or before the third Monday in January as provided for in Code of 1906, sections 4902-4906, and a motion was made to docket and dismiss the appeal, but the transcript was filed within four days after such motion, the court overruled the motion to docket and dismiss, holding that appellant was not in fault in the matter as had he gotten out a *certiorari* to the clerk to send up the record, and such writ would not have obtained the record much if any sooner than the date on which it was in fact filed in the court. *McKenzie v. Fellows*, 226.

16. *Criminal law. Disqualified jurors. Reversible error.*

Where a defendant on trial for crime uses every peremptory challenge allowed him by law, it is fatal error for the court to overrule his challenge of disqualified jurors for cause. *Dixon v. State*, 320.

17. *Improper argument of counsel.*

It is reversible error for the prosecuting attorney in the argument of a criminal case to call the attention of the jury to the fact that the wife of defendant had not testified and that the state could not introduce her as a witness. *Fannie v. State*, 378.

18. *Trial. Presence of defendant.*

It is fatal error in a murder trial to examine a witness in the absence of the defendant. *Lee v. State*, 387.

19. *Review. Constitutional questions. Matters not necessary to decision. Constitution 1890, Sec. 147. Laws 1908, Ch. 204. Interlocutory order. Civil cause.*

Under Constitution 1890, Sec. 147, providing that no judgment or decree in any chancery or circuit court rendered in a civil cause

APPEAL AND ERROR.

APPEAL AND ERROR—Continued.

shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, etc., but that if the supreme court shall find error in the proceedings other than as to jurisdiction and it shall be necessary to remand the case, the supreme court may remand it to that court which in its opinion can best determine the controversy; the question of the constitutionality of the laws of 1908, chapter 204, conferring jurisdiction upon chancery courts of suits for penalties for violation of anti-trust laws, will not be determined unless the supreme court should reverse the decree of the court below for some reason other than that the cause was not of equity jurisdiction. *Dukate v. Adams*, 433.

20. *Same.*

Sec. 147 of the Constitution of 1890, applies to appeals to settle the principles of the case as well as to appeals from final decrees. *Ib.*

21. *Jurisdiction. "Civil cause." Code 1906, Secs. 5004-1589. Constitution 1890, Sec. 147.*

Notwithstanding the fact that Sec. 5004, Code 1906, imposing a penalty for violation of the anti-trust laws, refers to the violation of such laws as an "offense" and requires the circuit judges to call the attention of the grand jury to this provision, and section 1589 provides that "offense" when used in the statutes shall mean any violation of law liable to punishment by criminal prosecution; still as the penalty is to be recovered in an action in the name of the state on the relation of the attorney-general or district attorney, such action is a "civil" rather than a "criminal" action within Sec. 147 of the Constitution of 1890, providing that no judgment shall be reversed for error in bringing the same in equity or law, and an action for the penalty will not be reversed because brought in the chancery court. *Ib.*

22. *Evidence. Necessity of objection.*

Where no objection was made to the introduction of evidence in the court below, error in its admission is waived. *For v. Baggett*, 519.

23. *Objections to instructions. Applicability to issue.*

Where instructions, applicable to the evidence, are objected to because not applicable to the issue made by the pleadings, this objection should be made when the instructions are presented for then an immediate amendment of the pleadings can be had,

APPEAL AND ERROR.

APPEAL AND ERROR—Continued.

and if not so made will not be considered in the supreme court on appeal. *Railroad Co. v. Pillows*, 527.

24. *Matters reviewable.*

Where in a suit for damages against a city, caused by a change of grade, the city secured the submission of the issue to the jury as to whether or not, plaintiff negligently constructed her house below an established grade, it could not complain on appeal that the jury found against it on this issue. *City of Jackson v. Muckenfuss*, 555.

25. *Attachment. Affidavit. Bond. Amendment. Code 1906, Secs. 136-775.*

Under Code of 1906, Sec. 136, providing that "in all cases where an attachment bond or affidavit may be defective in any respect or may be lost or destroyed, the plaintiff shall be allowed to file a new affidavit and bond which shall be in all respects as valid and binding as if given at the commencement of the suit," it was error, on motion to quash an affidavit which failed to state the name of the creditor or to describe the affiant as creditor, agent or attorney, to refuse to permit plaintiff to amend. *Grocery Co. v. Bennett*, 573.

26. *Criminal law. Right to trial de novo. Code 1906, Sec. 87.*

Under Sec. 87, Code 1906, so providing, when an appeal is prosecuted from a conviction by a justice of the peace to the circuit court, said appeal shall be tried *de novo*, and what was done in the justice court can in no wise affect the right of appellant to a trial in the circuit court, nor can any motion made in the circuit court prejudice his right to a trial of the case on its merits. *Payne v. State*, 588.

27. *Criminal law. Appeal. Preservation of objections. Motion for new trial.*

Where the court permitted the district attorney over the objection of the defendant to cross-examine him with reference to his application for a continuance, but no question was asked with reference to his guilt or innocence of the crime charged against him, such action by the court cannot be considered on appeal, where the point was not reserved in a motion for a new trial and was therefore waived. *Burrage v. State*, 598.

28. *Special judge. Powers.*

Where during the progress of a trial for murder it becomes necessary for the judge presiding to leave the court and absent him-

ARGUMENT OF COUNSEL.

APPEAL AND ERROR—Continued.

self therefrom for several days and the governor in accordance with the statute, governing such cases appointed a special judge by consent of all parties, to preside over the court in the absence of the regular judge such special judge was empowered to try all issues which might be presented to him during the absence of the regular judge. *Burrage v. State*, 598.

29. *Same.*

In such case the fact that the special judge continued the trial from the point where the regular judge had left off, cannot on appeal be assigned as error and it is immaterial that the regular judge had consented that this assignment of error might be made. *Ib.*

30. *Criminal law. New trial. Supporting affidavits. Newly discovered evidence. Instructions. Filed.*

An instruction not marked "filed" by the clerk of the lower court does not become a part of the record on appeal to the supreme court, and the court cannot say whether or not such instruction announced correctly the law applicable to the case, the same not being before the court. *Overton v. State*, 607.

31. *Appeal and error. Time for appeal. Code of 1906, Sec. 35.*

Under section 35, Code of 1906, if an appeal is desired from an interlocutory decree, such appeal "must be applied for within ten days after the date of the decree complained of." An appeal subsequently taken will be dismissed. *Sowell v. Sowell*, 623.

ARGUMENT OF COUNSEL.

1. *Code of 1906, Section 1918. Comment on failure of defendant to testify.*

Under the Code of 1906, section 1918 forbidding counsel to comment on the failure of defendant to testify, the word "comment" as employed in the statute, does not mean to criticise or condemn, or anathematize the accused on his failure to testify. It forbids any comment friendly or unfriendly. It forbids any remark of any character, in any words upon the failure of the accused to testify. The attention of the jury is not to be called to the fact at all by counsel. *Gurley v. State*, 190.

2. *Same.*

Where counsel does comment on the failure of the accused to testify, the fact that the court tells the jury not to consider such comment will not save the case on appeal from being reversed. *Ib.*

ATTACHMENT BOND—BAIL.

ATTACHMENT BOND.

1. *Affidavit. Bond. Amendment. Code 1906, Secs. 136-775.*

Under Code of 1906, Sec. 136, providing that "in all cases where an attachment bond or affidavit may be defective in any respect or may be lost or destroyed, the plaintiff shall be allowed to file a new affidavit and bond which shall be in all respects as valid and binding as if given at the commencement of the suit," it was error, on motion to quash an affidavit which failed to state the name of the creditor or to describe the affiant as creditor, agent or attorney, to refuse to permit plaintiff to amend. *Grocery Co. v. Bennett*, 573.

2. *Same.*

Under Code of 1906, Secs. 136-775, authorizing amendments, it was error, on a motion to quash an attachment because the bond did not describe plaintiff as a corporation, to refuse to permit plaintiff to amend. *Ib.*

BAIL.

1. *Pending appeal. Sufficiency of affidavits.*

Certificates of physicians not verified by affidavit, will not be considered by the court on an application for bail after conviction of a felony, pending an appeal to the supreme court. *Atkinson ex parte*, 744.

2. *Pending appeal. Jurisdiction of supreme court. Code 1906, Sec. 67. Constitution 1890, Sec. 146.*

Under the Constitution of 1890, Sec. 146, providing that the supreme court shall have such jurisdiction, as properly belongs to an appellate court, and Code of 1906, Sec. 67, giving said court or a judge thereof power to grant bail after conviction of a felony, pending appeal, such power is revisory only and should not be exercised until the petition for bail has first been acted on by the lower court. *Ib.*

3. *Pending of appeal. Health of accused. Code 1906, Sec. 67.*

Under Code of 1906, Sec. 67, providing for the admission of a person convicted of a felony to bail, pending an appeal, such person should be allowed bail, where six physicians make affidavit that confinement will aggravate an illness of the accused and imperil his life and health although two other physicians make affidavit to the contrary and one other party disputes them. *Ib.*

BANKRUPTCY.

BAIL—Continued.

4. *Consideration in supreme court. Merits.*

In an application for bail, pending an appeal, by a party convicted of a felony, the supreme court will not allow to be introduced as evidence or give any consideration to alleged errors occurring in the trial in the lower court. *Atkinson ex parte*, 744.

BANKRUPTCY.

1. *Preferences. Transfers. Necessity of recording. Code 1906, Sec. 2787.*

Under Bankruptcy Act July 1, 1898, Ch. 541, Sec. 60a, 30 Stat. 562, U. S. Comp. St. 1901, page 3445, as amended by Act Feb. 5, 1903, Ch. 487, Sec. 13, 32 Stat. 799, U. S. Comp. St. Supp. 1909, page 1315, invalidating transfers made within four months, and providing, that, if by law a transfer is required to be recorded, the period of four months shall not expire until four months after recording; a deed of trust, made more than four months before the grantor filed a petition in bankruptcy, but recorded within four months, is not void since under Sec. 2787, Code of 1906, an unrecorded deed of trust is valid as between the parties thereto and as against creditors and hence is not such an instrument, within the meaning of the bankrupt law, as is required by the laws of this state, to be recorded. *Oil & Fertilizer Co. v. Horne*, 629.

ON SUGGESTION OF ERROR.

2. *Preference. Mortgage. Avoidance by bankrupt.*

Even though Code of 1906, Sec. 2787, is a law by which recording a mortgage is "required" within Bankrupt Act, July 1, 1898, Ch. 541, Sec. 60a, 30 Stat. 562, U. S. Comp. St. 1901, page 3445, as amended by Act Feb. 5, 1903, Ch. 487, Sec. 13, 32 Stat. 799, U. S. Comp. St. Supp. 1911, page 1506, so that such mortgage though given more than four months before the filing of the petition in bankruptcy having been recorded within such period, may be avoided, notwithstanding there are only general creditors of the bankrupt; yet authority to avoid a preference, and recover the property, being given by section 60b, only to the trustee in bankruptcy, the bankrupt having made a composition settlement with his other creditors and been discharged without the mortgagee having proved his claim, or his mortgage being questioned, cannot, by reason of the bankrupt law, attack the mortgage and the sale thereunder. *Ib.*

BILLS AND NOTES—BUCKET SHOPS.

BANKRUPTCY—Continued.

3. *Same.*

In such case if the mortgage was fraudulent and obtained at a time when the grantor was insolvent and for the purpose of obtaining a preference, then he was equally at fault with the grantee, and a court of equity will refuse him any affirmative relief when he seeks to have the mortgage cancelled. *Ib.*

BILLS AND NOTES.

1. *Assignee of bona fide purchaser. Rights.*

Where a party executed his note to a savings bank for the purchase of a certificate of deposit, for an equal amount, drawing a higher rate of interest, and the note was deposited by the savings bank with another bank as security for a debt and the latter bank took it before maturity and without notice of any defense thereto; and after the note matured and the savings bank failed, the other bank attempted to collect the note and there was no notice of a set off made until the other bank sold the note at public auction to plaintiff after maturity, at which sale the maker of the note gave notice of his alleged right to set off his certificate of deposit. *Held*, that plaintiff having acquired the note from the bank which was a holder in good faith, was himself a *bona fide* holder for value, and that the certificate of deposit was, therefore, not available as a set off as against plaintiff's rights. *Sanders v. McAlister Bros. & Co.*, 227.

2. *Same.*

If a person give his note for stock in a corporation and the corporation proves a failure, the validity of the note is not affected thereby. *Ib.*

3. *Defenses. Admissibility.*

In a suit on a draft indorsed in blank by the drawer so as to make it negotiable by delivery, no defenses available between the original parties are admissible; but where such draft is specially indorsed our anti-commercial statute applies and all defenses available between the original parties can be pleaded. *Moore & Tabb v. Savings Bank*, 868.

BUCKET SHOPS.

1. *Laws of 1908, Chapter 118, Section 1.*

Section 1 of the Laws of 1908 deals alone with what are known as "bucket shops," and places maintained to receive orders for

CHANCERY COURTS—CITIES AND TOWNS.

BUCKET SHOPS—Continued.

this class of business, and those persons who are engaged in the management or conducting of this kind of business either as principal or agent. *Ascher & Baxter v. Moyse & Co.*, 36.

2. *Same.*

Laws of 1908, chapter 118, does not impliedly repeal Code of 1906, sections 1201, 1202, 1203, because the act of 1908 does not deal with the whole subject relating to futures, but prohibits the establishment of "bucket shops" in the state. An action may still be maintained under section 2303 for money lost in future transactions. *Ib.*

CHANCERY COURTS.

1. *Injunction. Estoppel. Accounting. Improvements.*

Where questions of estoppel, matters of accounting and claims for improvements are involved, the chancery court is the proper forum in which to litigate them. *Evans et al. v. Hoyer*, 244.

2. *Equity. Report of master. Conclusiveness of findings.*

The report of a master appointed by the chancery court to make findings in a case has the effect of the verdict of a jury in so far only as it deals with findings of facts supported by competent evidence. *Hines v. Naval Store Co.*, 802.

CITIES AND TOWNS.

1. *Criminal law. Judicial notice. Municipal ordinances.*

Courts will not take judicial notice of municipal ordinances. They must be introduced on the trial. *Thomas v. State*, 74.

2. *Municipal Ordinances. Appeal to circuit court.*

Where a criminal case is tried in a mayor's court for a violation of a municipal ordinance, it cannot be tried on appeal in the circuit court as a violation of the state law. *Ib.*

3. *Municipalities. Ordinances. Code 1906, section 3410, chapter 28.*

An ordinance of a town which provides "that chapter 28 of the annotated Code of Mississippi be and the same is hereby adopted as the criminal Code and laws of the town" is void, in that it attempts to confer upon the mayor of the town jurisdiction over all felonies as well as misdemeanors committed within the corporate limits. *Dismukes v. Town of Louisville*, 104.

4. *Same.*

Code 1906, section 3410, giving all the authority granted in the premises, expressly limits the power to misdemeanors. *Ib.*

CODE 1892—CODE 1906.

CODE 1892.

- § 2735. Tax title. Possession. *Smith v. Leavenworth*, 238.

CODE 1906.

- § 10. Libel and slander. Right of action. Defenses. Apology. Mitigation of damages. Principal and agent. *Fire Insurance Co. v. Betty*, 880.
- § 35. Decisions reviewable. Interlocutory decree. Time for appeal. *Sowell v. Sowell*, 623.
- § 67. Bail. Pending appeal. Sufficiency of affidavits. Jurisdiction of supreme court. Health of accused. Merits. Certificates of physician. *Atkinson ex parte*, 744.
- § 86. Appeal from justice of peace. Damages. *Galloway v. Champlin*, 822.
- § 87. Criminal law. Appeal. Right to trial de novo. *Payne v. State*, 588.
- §§ 136-775. Attachment. Affidavit. Bond. Amendment. *Grocery Co. v. Bennett*, 573.
- § 721. Appeal and error. Harmless error. Instructions. Conflicting evidence. Verdict. Railroads. Operation. Injuries to persons on track. Rate of speed. Definition of terms. Death. Elements of compensation. *Railroad Co. v. Moore*, 768.
- § 1105. Par. A. Carrying concealed weapons. Criminal prosecution. Defenses. Evidence. *Hurst v. State*, 402.
- § 1110. Exhibiting deadly weapons. Indictment. Requisites. *Parrett v. State*, 306.
- § 1166. False pretense. Fraud. Necessity for. *Pittman v. State*, 553.
- § 1394. Trespass. Indictment. Sufficiency. *Rube v. State*, 362.
- §§ 1428-1762. Intoxicating liquors. Sale. Variance. Time. *Oliver v. State*, 382.
- § 1508. Indictment. Amendment after proof. *Winston v. State*, 101.
- § 1573. Criminal law. Change of statute. Prosecution. *Britton v. State*, 584.
- § 1746. Intoxicating liquors. Change of statute. Increase of penalty. *Britton v. State*, 584.
- §§ 1746-1773. Intoxicating liquors. Sale. Indictment. Variance. *Taylor v. State*, 857.
- §§ 1763-5032. Criminal law. Indictment for selling liquors. *Wilburn v. State*, 392.
- § 1917. Actions against estates. Witnesses. Competency. Best evidence. Foundation. Secondary evidence. Hearsay. Declarations. Against interest. Gifts. Undue influence. Validity. *Baldrige v. Stribling*, 666.

 CODE 1906.

CODE 1906—Continued.

- § 1918. Comment on failure of defendant to testify. *Gurley v. State*, 190.
- § 1985. Railroads. Injuries to persons on track. Burden of proof. Constitution of United States, fourteenth amendment. Review. *New Orleans, M. & C. R. R. Co. v. Cole*, 173.
- § 1985. Master and servant. Injuries. Sufficiency of evidence. Discovered peril. *Railroad Co. v. Carraway*, 813.
- §§ 2345-2347. Justice of the peace. Answer of garnishee. Time of filing. Appeal. *Lumber & Mfg. Co. v. Mallett*, 135.
- § 2407. Guardian and ward. Bond. Liability covered. Conversion. Bond given after actual conversion. *Indemnity Co. v. State for use of Gillaspv*, 703.
- § 2522. Husband and wife. Gifts. Validity. Statutes. Construction. Legislative intent. *Kennington v. Hemingway*, 259.
- §§ 2575, 3126, 3127. Insurance. Actions. Limitations by contract. *Taylor v. Insurance Co.*, 480.
- § 2704. Grand jury. Excusing members of grand jury. Right of court and of foreman. Effect on indictment. *McCoy v. State*, 613.
- § 2765. Wills. Construction. Perpetuities. Suspension of alienation. Donee. Lives in being. Trustees. Cross remainders. *Henry v. Henderson*, 751.
- § 2770. Conveyance to husband and wife. Bona fide purchaser. Infants. Ejectment. Equal equities. *Conn v. Boutwell*, 353.
- § 2787. Bankruptcy. Preferences. Transfers. Necessity of recording. *Oil & Fertilizer Co. v. Horne*, 629.
- § 3410. Municipalities. Ordinances. *Dismukes v. Town of Louisville*, 104.
- § 3485. Priority of state as creditor. Statutes in derogation of sovereignty. Construction. Depositories. Subrogation. Right of surety. *Potter v. Fidelity & Deposit Co.*, 823.
- §§ 3497-3498. Licenses. Commerce. Privilege tax. Statutes. Constitution United States, Art. 1, secs. 8-10. Constitution Miss., sec. 112. *Canning Co. v. State*, 890.
- § 4029. Corporations. Appointment of receiver. Right to appoint. *Trust Co. v. State*, 440.
- §§ 4326-4328-4338. Tax sale. Filing deed. Time of sale. Taxation. *Simpson v. Interstate Coöperage Co.*, 312.
- § 4701. Board of supervisors. Claims for cutting timber. Sixteenth sections. Authority to settle. *Eastman v. Adams*, 460.
- § 4738. Penalties. Forfeitures. Actions to enforce. By whom brought. *Hurst v. State*, 402.
- § 4775. Statute of Frauds. Contracts in consideration of marriage. *Pardue v. Ardis*, 884.

 CONSTITUTION 1890—CONSTITUTIONAL LAW.

CODE 1906—Continued.

- § 4779. Sale of personalty. Purchase money. Payment. Delivery. Condition precedent. Intention. Writ of inquiry. Damages. *Johnson v. Tabor*, 78.
- § 4867. Railroads. Injuries to persons at station. Duty of agent. *Odom v. Railroad Co.*, 642.
- §§ 4902-4906. Appeal and error. Failure to file transcript. Dismissal. *McKenzie v. Fellows*, 226.
- § 4906. Appeal and error. Time of taking appeal. Limitation. Appearance. Delay in prosecuting. Dismissal. *McAllister v. Richardson*, 132.
- § 5004. Equity. Action for penalty. Pleading. Multifariousness. *Dukate v. Adams*, 433.
- §§ 5004-1589. Appeal and error. Jurisdiction. "Civil cause." Constitution 1890, sec. 147. *Hurst v. State*, 402.
- § 5005. Corporations. Sales of stock. Trust. Notes. Liability of maker. *Kelly v. Bank*, 692.
- § 5079. Wills. Codicil. Revocation. Insurance. Beneficiaries. *Hawkins v. Duberry*, 17.

CONSTITUTION 1890.

- § 87. Insurance. Actions. Limitations by contract. Special or local laws. Limitations of actions. *Taylor v. Insurance Co.*, 480.
- § 90. Par. Q. Special laws. Drainage. Natural Watercourses. *Crenshaw v. State*, 457.
- § 100. Board of Supervisors. Claims for cutting timber. Sixteenth sections. Authority to settle. *Eastman v. Adams*, 460.
- § 112. Licenses. Commerce. Privilege tax. Statutes. Constitution United States, Art. 1, secs. 8-10. *Canning Co. v. State*, 890.
- § 146. Bail. Pending appeal. Sufficiency of affidavits. Jurisdiction of supreme court. Health of accused. Merits. Certificates of physician. *Atkinson ex parte*, 744.
- § 147. Appeal and error. Review. Constitutional questions. Matters not necessary to decision. Interlocutory order. Civil cause. *Dukate v. Adams*, 433.

CONSTITUTIONAL LAW.

1. *Appeal and error. Review. Constitutional questions. Matters not necessary to decision. Constitution 1890, Sec. 147. Code 1906, Sec. 5004. Laws 1908, Ch. 204. Interlocutory order. Civil cause.*

Under Constitution 1890, Sec. 147, providing that no judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdic-

CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW—Continued.

tion to render said judgment or decree, etc., but that if the supreme court shall find error in the proceedings other than as to jurisdiction and it shall be necessary to remand the case, the supreme court may remand it to that court which in its opinion can best determine the controversy; the question of the constitutionality of the laws of 1908, chapter 204, conferring jurisdiction upon chancery courts of suits for penalties for violation of anti-trust laws, will not be determined unless the supreme court should reverse the decree of the court below for some reason other than that the cause was not of equity jurisdiction. *Dukate v. Adams*, 433.

2. *Same.*

Sec. 147 of the Constitution of 1890, applies to appeals to settle the principles of the case as well as to appeals from final decrees. *Ib.*

3. *Appeal and error. Jurisdiction. "Civil cause." Code 1906, Secs. 5004-1589. Constitution 1890, Sec. 147.*

Notwithstanding the fact that Sec. 5004, Code 1906, imposing a penalty for violation of the anti-trust laws, refers to the violation of such laws as an "offense" and requires the circuit judges to call the attention of the grand jury to this provision, and section 1589 provides that "offense" when used in the statutes shall mean any violation of law liable to punishment by criminal prosecution; still as the penalty is to be recovered in an action in the name of the state on the relation of the attorney-general or district attorney, such action is a "civil" rather than a "criminal" action within Sec. 147 of the Constitution of 1890, providing that no judgment shall be reversed for error in bringing the same in equity or law, and an action for the penalty will not be reversed because brought in the chancery court. *Ib.*

4. *Vested rights.*

The legislature has no power to take away vested rights in order to create a cause of action out of an existing transaction for which there was at the time of its occurrence no remedy; nor can it destroy a valid defense to an action existing before the enactment of the statute. *Richards v. City Lumber Co.*, 678.

5. *Licenses. Commerce. Privilege tax. Statutes. Constitution United States, Art. 1, Secs. 8-10. Constitution Miss., Sec. 112. Code 1906, Secs. 3497-3498. Laws 1908, Ch. 192.*

Code 1906, Sec. 3498, as amended by Laws 1908, Ch. 192, providing that in addition to the privilege license imposed by Sec.

CONSTRUCTION OF STATUTES.

CONSTITUTIONAL LAW—Continued.

3497, Code 1906, which imposes a tax on canning factories, there shall be paid a tax fee of three cents per barrel upon all oysters canned and packed in and all oysters shipped raw in or from this state, etc., provides a method for the collection of an additional privilege tax to that imposed in section 3497, and the whole tax must be paid by the local party engaged in taking or canning oysters in the state or by the local dealers selling or shipping oysters, as a privilege tax for conducting the business in this state, and so construed the statute does not interfere with interstate commerce, in violation of the Constitution of the United States, Art. 1, Sec. 8, nor impose duties on imports or exports in violation of Art. 1, Sec. 10, of that Constitution, nor does it destroy the equality and uniformity of the taxation laws in violation of the Constitution of 1890, Sec. 112. *Canning Co. v. State*, 890.

6. *Same.*

The constitutional requirement as to uniformity of taxation has no reference to taxation of occupations. *Ib.*

CONSTITUTION OF UNITED STATES.

Art. 1, secs. 8-10. Constitution of Mississippi, 1890, sec. 112. Code 1906, §§ 3497-3498. Licenses. Commerce. Privilege tax. Statutes. *Canning Co. v. State*, 890.

CONSTRUCTION OF STATUTES.

1. *Repeal by implication.*

The repeal of a statute by implication is not favored in the law and where two statutes are seemingly repugnant they must be so construed, if possible, that the latter shall not be a repeal of the former by implication. *Ascher & Baxter v. Moyse & Co.*, 36.

2. *Same.*

Where there is a positive repugnancy between the provisions of the new law and those of the old, then the old law is repealed by implication only, to the extent of the repugnancy. *Ib.*

3. *Same.*

Where a later act covers the whole subject of earlier acts, and embraces new provisions, and plainly shows that it was intended, not only as a substitute for the earlier acts, but to cover the

CONSTRUCTION OF STATUTES.

CONSTRUCTION OF STATUTES—Continued.

whole subject then considered by the legislature, and to prescribe the only rules in respect thereto, it operates as a repeal of all former statutes relating to such subject-matter, even if the former acts are not in all respects repugnant to the new act. *Ascher & Baxter v. Moyse & Co.*, 36.

4. *Same.*

The rule that a later act covering the whole subject of a former act and embracing new provisions operates by implication to repeal the prior act is subject to the qualification that where the later act expresses the extent to which it is intended to repeal prior laws, as by a clause repealing all laws in conflict therewith, it excludes any implication of a more extended repeal. *Ib.*

5. *Construction. Previous acts.*

Courts in construing a statute will presume that the legislature in enacting the statute was familiar with its own enactments and with the construction which the courts had placed on those enactments. *Ib.*

6. *Construction. Acts 1908, chapter 118, section 2.*

The proviso of section 2 of the acts of 1908, exempting from the condemnation of this act those transactions conducted and carried on through the medium of the mail or telegraph between persons in the state and persons outside of the state, was inserted by the legislature upon the erroneous idea that this provision was necessary to preserve the constitutionality of the act, and it does not render dealings in futures valid when conducted by such persons. *Ib.*

7. *Legislative intent.*

In the construction of statutes, courts chiefly desire to reach the real intention of the framers of the law, and knowing this to adopt that interpretation which will meet the real meaning of the legislature, though such interpretation may be beyond or within, wider or narrower than the mere letter of the enactment. *Kennington v. Hemingway*, 259.

8. *Penalties. Forfeitures. Actions to enforce. By whom brought. Code 1906, Sec. 4738.*

Although in Sec. 4738, Code 1906, providing that it shall be the duty of the revenue agent to sue all corporations "for all penalties or forfeitures for all past due obligations and indebtedness of any character whatever owing to the state or any county etc.."

CONTRACTS.

CONSTRUCTION OF STATUTES—Continued.

there is no comma between the words "forfeitures" and "for all past due" the statute will not be held to limit the right of the revenue agent to suits for penalties or forfeitures to those growing out of past due obligations of the state, but will be held to permit him to sue for any penalties or forfeitures. *Dukate v. Adams*, 433.

9. *Statutes. Construction and operation. Mistake in punctuation.*

While punctuation is a valuable aid in the construction and interpretation of a statute, it cannot control the plain meaning thereof, and the courts will disregard the same and repunctuate the statute if necessary, to give effect to what appears to be the plain meaning thereof. *Ib.*

10. *Laws 1910, Ch. 135. Retroactive operation.*

The rule is fundamental, in the construction of statutes, that they will be construed to have a prospective operation, unless the contrary intention is manifested by the clearest and most positive expression; such a construction should be placed upon a statute in order to preserve, if possible, its constitutionality. *Richards v. City Lumber Co.*, 678.

CONTRACTS.

1. *Public policy.*

It is the public policy of the state to condemn contracts commonly known as "futures," and a contract for the payment of differences in price arising out of the rise and fall of the market price above or below the contract price is a wager on the future price of a commodity and is invalid. *Ascher & Baxter v. Moyse & Co.*, 36.

2. *Construction. Extra-territorial force. Public policy.*

An act of the legislature has no extra-territorial force, and neither makes unlawful a contract made in another state nor subjects a party thereto to punishment; yet the courts of the state will not enforce contracts made out of this state which are contrary to its public policy. *Ib.*

3. *Chattel mortgages. Amounts secured.*

The courts construe doubtful contracts when the parties themselves cannot agree as to the true meaning; but when the parties agree, and the contract is made certain, there is no field for interference by the court. *Candler v. Cromwell*, 161.

CONTRACTS.

CONTRACTS—Continued.

4. *For benefit of third parties. Pleading. Matters of implication.*

Where a contract is made with a carrier by a wife for her husband's benefit the husband has a right to bring suit for its breach in his own name. *Canada v. Y. & M. V. R. R. Co.*, 274.

5. *Same.*

Where in such case, the declaration alleges that the contract sued on was made with an agent of the defendant carrier, this carries with it the inference that in making it the agent acted within the scope of his authority. *Ib.*

6. *Infants. Conveyances. Avoidance. Bona fide purchaser.*

The right of an infant to void his contract is an absolute and paramount right, superior to all equities of other persons and may be exercised against a bona fide purchaser from the infant's grantee. *Conn v. Boutwell*, 353.

7. *Limitations. Code of 1906, Secs. 2575, 3126, 3127.*

Code 1906, Sec. 3127, providing that the limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between the parties, etc., does not repeal or nullify Sec. 2575, in view of the facts that these two sections were adopted at the same time, are in different chapters and that Sec. 3126 in the same chapter as Sec. 3127 provides that chapter shall not apply to any suit which is limited by any statute to be brought within a shorter period than is prescribed in such chapter, and because repeals by implication are not favored by the courts. *Taylor v. Insurance Co.*, 480.

8. *Construction. Notes.*

In construing contracts, effect must be given to each word contained in it and if the language thereof is plain and unambiguous it is unnecessary to invoke any rule of construction in order to interpret it. *Harris v. Townsend*, 590.

9. *Actions for damages. Scope of inquiry.*

When a valid contract is once made for the sale of timber rights which specified no time for the completion of the contract, the court will construe the contract so as to enforce the completion within a reasonable time, determinable from all the facts surrounding each particular case; but will not declare any such contract unreasonable so as to avoid the consequences except on a direct proceeding to cancel the lease. *Hines v. Naval Store Co.*, 802.

CONVEYANCES.

CONTRACTS—Continued.

10. *Parol evidence. Consideration.*

Parol evidence is admissible to explain or even contradict a written contract as to the mere consideration; but when the consideration is contractual, parol evidence is no more admissible to vary that than it is any other part of the written instrument. *Dodge v. Outrer*, 844.

CONVEYANCES.

1. *Husband and wife. Estate conveyed. Estate if entirety. Survivorship.*

Where a deed was executed in the year 1861 conveying lands to a husband and his wife, under the law then in force, it conveyed to them an estate by entireties and consequently on the death of either the other became the sole owner and may convey the fee of the land therein described. *Ellis & Co. v. Walker*, 326.

2. *Same.*

In such case the fact that the word "his" is used instead of "their" in habendum clause is immaterial as this was merely a clerical error. *Ib.*

3. *Conveyance to husband and wife. Code of 1906, section 2770. Bona fide purchaser. Infants. Ejectment. Equal equities.*

Under section 2770, Code of 1906, which has been the law in this state since the adoption of the Code of 1880 and which provides that "all conveyances or demises of land made to two or more persons or to a husband and wife, shall be construed to create estates in common, and not in joint tenancy or entirety, unless it manifestly appears from the tenor of the instrument, that it was intended to create an estate in joint tenancy or entirety with the right of survivorship," a deed to a husband and his wife creates an estate in common and each owns an undivided one-half interest in the land. *Conn v. Boutwell*, 353.

4. *Infants. Avoidance. Bona fide purchaser.*

The right of an infant to void his contract is an absolute and paramount right, superior to all equities of other persons and may be exercised against a bona fide purchaser from the infant's grantee. *Ib.*

5. *Same.*

When an infant conveys lands the title to which is in him, in the eye of the law there is no conveyance—not void it is true, but

CORPORATIONS.

CONVEYANCES—Continued.

voidable; and it is not necessary for the infant to go into chancery to disaffirm his conveyance, but he has the right to bring an action of ejectment for the recovery of the land upon the idea that he never made any legal conveyance of the property. *Conn v. Boutwell*, 353.

6. *Homestead. Validity. Code 1906. Secs. 2159-2156.*

A conveyance of the homestead by the husband living with his wife thereon, to the wife and other grantees is under Code 1906, Sec. 2159, so providing invalid as to the grantees therein other than the wife unless signed by the wife. *Chatman v. Poindexter*, 496.

7. *Same.*

The fact that such deed was executed in payment of a claim against the grantor for labor "done and performed" and that under Sec. 2156, Code 1906, the land conveyed was not exempt from execution, does not dispense with the necessity of the wife's signature to the deed. *Ib.*

8. *Landlord and tenant. Existence of relation. Bond for title. Rights of landlord. Lien on crops for rent. Equitable estoppel.*

Where the vendor of land executed a bond for title to the vendee, and put him in possession, the bond providing that the vendee should pay interest on the purchase money and that in case the purchase money was not paid promptly at maturity that the vendee should pay rent to an amount equal to the interest, on the vendee's failure to pay the purchase money, the vendor thereby became landlord and had a right to collect rent to an amount equal to the interest. *Robinson Co. v. Weathersby*, 724.

9. *Fraudulent. Homestead. Motive of transfer. Fraud. Evidence. Sufficiency.*

The owner of an exempt homestead has the right to convey the same and the motives moving him do not in any way affect the title of the grantee. *Willoughby v. Pope*, 808.

CORPORATIONS.

1. *Forfeiture of franchises. Appointment of receiver.*

Where a loan company by means of attractively worded literature and by representations of its soliciting agents, seeks to induce the public generally, and prospective customers particularly, to believe that all purchasers of its contracts will receive loans from the company upon easy terms with which to purchase homes, and the funds of the corporation and its method of business, render

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CORPORATIONS—Continued.

it impossible for the company to make loans to all purchasers of its contracts, its promises so to do, evidences an intention to defraud, and its whole course of business constitutes such a systematic violation and abuse of the rights and privileges conferred upon it by its charter as to justify either the revocation of its charter or the issuance of a writ of injunction enjoining the further prosecution of such business. *Trust Co. v. State*, 440.

2. *Appointment of receiver. Right to appoint. Code 1906, Sec. 4029.*

In the absence of a statute so providing, the chancery court in a proceeding to restrain a corporation from continuing in the business of selling and disposing of loan and investment contracts and asking for the appointment of a receiver, is without power to appoint a receiver or trustee to wind up the affairs of such corporation. Sec. 4029, Code 1906, only providing for the appointment of such trustee after judgment of forfeiture and ouster. *Ib.*

3. *Sales of stock. Trust. Notes. Liability of maker.*

In a suit against the guarantor of a promissory note given for the purchase of corporate stock it is no defense that the stock was purchased for another corporation, the corporation selling the stock having no knowledge of that fact; in such case, Ch. 88, Sec. 5, Laws of 1900 (Sec. 5005, Code of 1906) providing that "no corporation shall, directly or indirectly purchase or own the capital stock or any part thereof, of any other corporation," etc., having no application. *Kelly v. Bank*, 692.

4. *Same.*

In such case where the purchaser signed his promissory note for the purchase price of the stock as "trustee" he is liable as a maker of the note, the word "trustee" not altering his individual liability. *Ib.*

CRIMINAL LAW.

1. *Trial. Suspicion. Proof.*

A party cannot be convicted of a crime on suspicion alone, however strong and well founded it may be. There must be proof. *Byrd v. City of Hazlehurst*, 57.

2. *Trial. Argument of counsel.*

In a trial for murder where the district attorney was permitted over the objection of defendant to say to the jury, "If you bring

CRIMINAL LAW.

CRIMINAL LAW—Continued.

in a verdict of manslaughter, the court does not have to sentence defendant to the penitentiary, but can fine her or send her to the county farm," it was reversible error. *Minor v. State*, 107.

3. *Instructions. Harmless error.*

Where accused was indicted for an assault and battery with intent to kill and murder and the evidence only showed an assault with intent to kill, it was harmless error for the court to instruct the jury that if they believed from the evidence beyond all reasonable doubt that defendant was guilty of assault with intent to kill and murder they should find him guilty as charged in the indictment, as under an indictment for an assault and battery with intent to kill and murder a conviction can be had for assault with intent to kill and murder. *Flowers v. State*, 108.

4. *Same.*

The crimes of assault and assault and battery with intent to kill and murder, are merely statutory forms of attempt to commit murder, are both created by the same statute and the punishment for each is the same. *Ib.*

5. *Character of accused. Particular acts.*

While a witness introduced as to the character of accused for peace or violence can testify as to his general reputation on that subject, it is error to compel him to testify as to the details of a number of independent fights, etc., in which it was claimed that defendant had been engaged. *Neal v. State*, 122.

6. *Suspension of sentence. Void provisions. Powers of Court.*

Suspending the imposition of a sentence is nothing more than a continuance of a case after plea or verdict of guilty for sentence at a later time and one who does not object to the suspension of sentence, cannot complain at a subsequent term that the court has no authority to suspend sentence, and that by so doing it lost jurisdiction to proceed. *Hoggett v. State*, 269.

7. *Same.*

A proviso in the order of the court suspending a sentence, that the accused leave and remain out of the county is void. *Ib.*

8. *Same.*

A court has no power to indefinitely suspend the imposition of a sentence after plea or verdict of guilty where the court fails to

CRIMINAL LAW.

CRIMINAL LAW—Continued.

impose sentence the case remains in the same attitude as if it had simply been continued for sentence with accused's consent. *Ib.*

9. *Second offense. Vagrancy. Punishment.*

Where a greater punishment may be inflicted for a second or subsequent violation of a penal law than for the first, the fact that the offense is a second or subsequent violation must be directly averred in the information or indictment to justify the increased punishment; else it will not be considered as an offense for which the increased punishment can be inflicted but will be deemed to be the first offense. *Ib.*

10. *Disqualified jurors. Reversible error.*

Where a defendant on trial for crime uses every peremptory challenge allowed him by law, it is fatal error for the court to overrule his challenge of disqualified jurors for cause. *Dixon v. State*, 320.

11. *Indictment for selling liquors. Code 1906, sections 1763-5032. Laws of 1908, chapters 113-114-115.*

Where a party was indicted under Code of 1906, section 5032, for the sale of vinous, alcoholic and intoxicating liquors, in less quantities than one gallon, within five miles of the University of Mississippi, such indictment was a nullity as this section of the Code was repealed by chapters 113-114-115 of the Laws of 1908. *Wilburn v. State*, 392.

12. *Same.*

Where an indictment is void, charging no offense at all, the court is without power to permit an amendment thereof. *Ib.*

13. *Evidence. Self-serving declaration. Examination of witnesses.*

Where a defendant on trial for the larceny of a steer claimed that he was employed by his brother to drive two steers to market and that he knew nothing about their ownership, except what his brother told him, and that he did not make the sale nor share in the proceeds, but was only paid for driving the cattle, it was reversible error for the court to exclude the testimony of witnesses that accused had stated this to them while driving the cattle to market as such declarations were not self-serving, but explanatory of defendant's possession. *Johnston v. State*, 397.

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CRIMINAL LAW—Continued.

14. *Cross-examination of witnesses. Improper questions.*

It was improper for the district attorney to ask a party charged with crime, if he was not known as "Hangman Johnston" and if he had not hanged forty-three men. *Johnston v. State*, 397.

15. *Change of statute. Prosecution. Code 1906, Sec. 1573.*

Under Sec. 1573, Code of 1906, so providing any crime committed prior to a change in a law is prosecuted under the law as it stood before the change was made. *Britton v. State*, 584.

16. *Appeal. Right to trial de novo. Code 1906, Sec. 87.*

Under Sec. 87, Code 1906, so providing, when an appeal is prosecuted from a conviction by a justice of the peace to the circuit court, said appeal shall be tried *de novo*, and what was done in the justice court can in no wise affect the right of appellant to a trial in the circuit court, nor can any motion made in the circuit court prejudice his right to a trial of the case on its merits. *Payne v. State*, 588.

17. *Appeal. Preservation of objections. Motion for new trial.*

Where the court permitted the district attorney over the objection of the defendant to cross-examine him with reference to his application for a continuance, but no question was asked with reference to his guilt or innocence of the crime charged against him, such action by the court cannot be considered on appeal, where the point was not reserved in a motion for a new trial and was therefore waived. *Burrage v. State*, 598.

18. *Competency of juror. Personal opinions. Negro testimony.*

Even where the jurors have been accepted by both sides and the panel is complete, one of the panel may be challenged for cause, where the evidence relied on by the state is negro testimony and such juror admits that he would not convict on negro testimony. *Ib.*

19. *Same.*

In such case the peremptory challenge of the juror was harmless as such juror was incompetent and should be set aside for cause. *Ib.*

20. *Special judge. Powers.*

Where during the progress of a trial for murder it becomes necessary for the judge presiding to leave the court and absent himself therefrom for several days and the governor in accordance

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CRIMINAL LAW—Continued.

with the statute, governing such cases appointed a special judge by consent of all parties, to preside over the court in the absence of the regular judge such special judge was empowered to try all issues which might be presented to him during the absence of the regular judge. *Ib.*

21. *Same.*

In such case the fact that the special judge continued the trial from the point where the regular judge had left off, cannot on appeal be assigned as error and it is immaterial that the regular judge had consented that this assignment of error might be made. *Ib.*

22. *Reception of verdict. Sunday.*

The reception of a verdict in a murder case on Sunday is not invalid, its reception being merely a ministerial act. *Ib.*

23. *Appeal and error. New trial. Supporting affidavits. Newly discovered evidence. Instructions. Filed.*

An instruction not marked "filed" by the clerk of the lower court does not become a part of the record on appeal to the supreme court, and the court cannot say whether or not such instruction announced correctly the law applicable to the case, the same not being before the court. *Overton v. State*, 607.

24. *New trial. Newly discovered evidence. Impeachment. Appellant.*

A motion for a new trial on account of newly discovered evidence was properly overruled where the affidavit accompanying such motion was not signed by the defendant and by only two of his four attorneys and the newly discovered evidence merely tended to impeach the credibility of the witnesses and was merely negative in its character. *Ib.*

25. *Courts. Jurisdiction.*

Where concurrent jurisdiction is vested in two courts, the court first acquiring jurisdiction, acquires exclusive jurisdiction and if a proceeding is instituted in another court about the same subject-matter after one of the courts of concurrent jurisdiction has acquired control, the suit should be dismissed in the last court to acquire jurisdiction. *Rogers v. State*, 847.

26. *Same.*

When one court of concurrent jurisdiction, has acquired jurisdiction, and voluntarily relinquishes it by *nolle pros* or dismissal of the case, the other court can proceed with the case. *Ib.*

DAMAGES.

CRIMINAL LAW—Continued.

27. *Same.*

Where a criminal prosecution was pending in a justice court when an indictment for the same offense was returned in the circuit court, and the proceeding in the justice court was then dismissed, it was proper to proceed under the indictment in the circuit court. *Rogers v. State*, 847.

28. *Former jeopardy.*

A former conviction before a justice of the peace competent to try the case is a bar to an indictment for the identical offense subsequently presented in the circuit court. *Smith v. State*, 853.

29. *Pleading. Demurrer.*

A demurrer to a plea is a confession of the truthfulness of the averments of the plea. *Ib.*

30. *Replication. Demurrer. Pleading.*

A demurrer to a replication admits the facts therein stated. *Ib.*

31. *Jurisdiction. Affidavit.*

A justice of the peace cannot acquire jurisdiction to try an accused where no affidavit has been lodged with him, charging an offense. *Taylor v. State*, 857.

DAMAGES.

1. *Invalid release. Tender of money received for release.*

Where a release from damages for personal injury is obtained by fraud, it is void and the plaintiff on bringing suit need not tender the money received thereunder, but the jury on rendering a verdict for plaintiff should give the defendant credit for the money paid for such release and legal interest thereon. *St. Louis & S. F. R. Co. v. Ault*, 341.

2. *Carriers. Breach of contract.*

Where a passenger is negligently put off or allowed to get off at the wrong station, no case for punitive damages is made, unless there is some reckless, wanton, wilful, capricious or wrongful act done on the part of the agent or servant of the carrier. *G. & S. I. R. Co. v. Cole*, 411.

3. *Board of supervisors. Claims for cutting timber. Sixteenth sections. Authority to settle Code 1906, Sec. 4701. Constitution 1890, Sec. 100.*

Under Code of 1906, Sec. 4701, giving boards of supervisors jurisdiction and control of sixteenth sections situated in their coun-

DAMAGES.

DAMAGES—Continued.

ties, etc., such boards have the right to compromise and settle unliquidated claims for damages for the wrongful cutting of trees on such land, and this section of the Code is not violative of Constitution of 1890, Sec. 100, providing that no liability to the state shall be remitted or in any way extinguished, except on payment of its face value, but that the legislature may provide by general law for the compromise of doubtful claims. *Eastman v. Adams*, 460.

4. *Sales. Remedies of buyer. Items of damage.*

Where a party buys an engine which is worthless, and rejects the same on that account he is entitled to recover of the seller all damages he has sustained by the seller's breach of contract including freight paid by him on the engine and a reasonable sum for storing and caring for the engine, unless he was directed by the seller not to store and care for it. *Ash v. Harvester Co.*, 542.

5. *Municipal corporations. Public improvements. Change of grade. Waiver.*

Where a property owner is required by a resolution of a municipality to construct a sidewalk in front of her property on a certain grade within twenty days, or show cause for her failure to do so, she did not by constructing such sidewalk waive her right to claim damages for being forced thereby to raise her lot and houses to conform to such grade and the fact that she waited for more than twenty days to construct such sidewalk makes no difference. *City of Jackson v. Muckenfuss*, 555.

6. *Damages. Punitive. Grounds for imposing.*

Punitive damages are recoverable, not only for willful and intentional wrong, but for such gross and reckless negligence as is the equivalent of willful wrong in the eye of the law. *Godfrey v. Railway Co.*, 565.

7. *Carriers. Duty to receive passengers. Action for failure.*

In an action against a street car company for damages for failing to stop its car and admit plaintiff as a passenger, an instruction that "if plaintiff did not sustain any actual damages, and that the conductor of defendant's servants was not insulting 'and' intentionally willful, even though negligent, then the jury should only award plaintiff nominal damages," is erroneous for two reasons. First, because it required the jury to believe that defendant's conduct was insulting, capricious and intentionally willful, the

DAMAGES.

DAMAGES—Continued.

three adverbs should have been used in the alternative and not conjunctively, and second, the phrase "even though negligent" would have warranted the jury in believing that any degree of negligence, even gross negligence was intended. *Godfrey v. Railway Co.*, 565.

8. *Carriers. Duty to receive passengers. Actions for failure.*

If an intending passenger is at a proper place and in time to catch an approaching street car and could have been seen by the servants of the company in charge of such car by the exercise of due care, then a failure to see such passenger and to stop and take her up is negligence and renders the company liable for damages. *Ib.*

9. *Same.*

In such case if the conduct of defendant servants was characterized by willful, intentional or reckless disregard of plaintiff's right, exemplary damages may be imposed. *Ib.*

10. *Judgment. Operative as bar. Prospective damages.*

A declaration, upon which a former recovery was had for damages for a continuing nuisance caused by the erection of an embankment which stopped the natural drainage of water and caused it to overflow plaintiff's land, did not seek to recover prospective damages, although it alleged that the land was permanently damaged; this simply meant that the damage then accrued was permanent—that the reduction in value of the land was permanent and such former recovery is not a bar to damages afterwards accruing from subsequent overflows. *Rosamond v. Carroll County*, 701.

11. *Same.*

To run a railroad train at night propelled by the powerful agency of steam or electricity through an incorporated city or town and in violation of the statute at such a rate of speed as to make it impossible, by the exercise of ordinary care, to stop the train within the distance shown by the glare of the headlight of the engine, is such reckless conduct amounting to willfulness as will justify the imposition of punitive damages in favor of one struck on its tracks and injured thereby. *Railroad Co. v. Moore*, 768.

12. *Instructions. Punitive damages. Definition.*

It is not necessary that the jury should be instructed as to what constitutes punitive damages; it is presumed that the jury understands what is meant by punitive damages as much as they understand what is meant by actual or compensatory damages. *Ib.*

DAMAGES.

DAMAGES—Continued.

13. *Same.*

An instruction to the jury as to their right to inflict punitive damages is not improper for failure to define what "punitive" damages are, in the absence of a request for such a definition. *Ib.*

14. *Death. Actions for causing. Damages. Elements of compensation. Loss of society. Code 1906, Sec. 721.*

In a suit under Code 1906, Sec. 721, by a widow and children for the death of a husband and parent, the jury may take into consideration the loss to the wife and children of the companionship, protection and society of the husband and father but not by way of solatium. *Ib.*

15. *Injury to stock. Sufficiency of evidence. Value. Opinion evidence.*

In a suit for damages for killing a cow, it was not error for the court to refuse to allow a witness to answer the question "what would be the value of a cow two and a half years old, light red in color and giving milk," as the question afforded no data from which the witness could have based an intelligent opinion as to value. *Railroad Co. v. Walden*, 781.

16. *Trespass to real estate.*

Where one boxed the trees and extracted the turpentine therefrom without the consent of the owner, he was liable only for the actual damages sustained by the owner and the owner had the option of recovering either the full amount of damage, that necessarily as well as that unnecessarily inflicted upon the trees in the process of extracting the products therefrom; or of recovering these products, or their value, together with the amount of any damage unnecessarily inflicted upon the trees in the process of extraction. *Hines v. Naval Store Co.*, 802.

17. *Same.*

In such case if the owner elects to take the products or their value, he cannot also recover the damage necessarily inflicted upon the trees in the process of extracting these products. *Ib.*

18. *Appeal from justice of peace. Code 1906, Sec. 86.*

Sec. 86 of the Code of 1906 providing that if on appeal from a judgment of a justice of the peace by defendant judgment be rendered for plaintiff for a sum equal to or greater than the amount recovered before the justice of the peace, ten per cent damages shall be added to the judgment by the circuit court, has no

DEEDS.

DAMAGES—Continued.

application to an appeal of a defeated plaintiff, but refers to a defendant who appeals from the judgment of a justice of the peace and fails to make good in the circuit court. *Galloway v. Champlin*, 822.

DEEDS.

1. *Reformation. Mistakes. Equity jurisdiction.*

A bill in equity will lie for the reformation of a deed and to adjust the equities between the parties, where complainant charges that when he conveyed certain lands to defendant, it was agreed that complainant was not the sole owner of one of the tracts, and that he was conveying only his interest therein, that he left the preparation of the deed to defendant who was an attorney, and assumed that it would be drawn according to their agreement, but that instead the deed contained a warranty, of title as to both tracts and defendant had refused to pay the purchase price because of an alleged breach of warranty. *Eichelberger v. Cooper*, 253.

2. *Husband and wife. Estate conveyed. Estate of entirety. Survivorship.*

Where a deed was executed in the year 1861 conveying lands to a husband and his wife, under the law then in force, it conveyed to them an estate by entireties and consequently on the death of either the other became the sole owner and may convey the fee of the land therein described. *Ellis & Co. v. Walker*, 326.

3. *Same.*

In such case the fact that the word "his" is used instead of "their" in habendum clause is immaterial as this was merely a clerical error. *Ib.*

4. *Conveyance to husband and wife. Code of 1906, section 2770. Bona fide purchaser. Infants. Ejectment. Equal equities.*

Under section 2770, Code of 1906, which has been the law in this state since the adoption of the Code of 1880 and which provides that "all conveyances or demises of land made to two or more persons or to a husband and wife, shall be construed to create estates in common, and not in joint tenancy or entirety, unless it manifestly appears from the tenor of the instrument, that it was intended to create an estate in joint tenancy or entirety with the right of survivorship," a deed to a husband and his wife creates an estate in common and each owns an undivided one-half interest in the land. *Conn v. Boutwell*, 353.

DEFENSES AVAILABLE—EQUITY.

DEEDS—Continued.

5. *Validity. Equitable title.*

An unsealed deed executed by a corporation is insufficient to convey the legal title; it does however convey the equitable title, which title a court of equity will protect and enforce. *Hines v. Naval Store Co.*, 802.

DEFENSES AVAILABLE.

Bills and notes. Admissibility.

In a suit on a draft indorsed in blank by the drawer so as to make it negotiable by delivery, no defenses available between the original parties are admissible; but where such draft is specially indorsed our anticommercial statute applies and all defenses available between the original parties can be pleaded. *Moore & Tabb v. Savings Bank*, 868.

DESCENT.

Wills. Construction.

Personal property not disposed of by the testator's will passes under the statute of descent and distribution to the widow and testator's children and grandchildren according to that statute. *Eaton v. Broaderick*, 26.

DIVORCE.

Condonation. Friendly correspondence.

Where in a suit for divorce by the wife there is ample evidence of cruel treatment by the husband extending over several years, a divorce should not be denied because the wife after such treatment wrote her husband a friendly letter. *Forrester v. Forrester*, 155.

EQUITY.

1. *Chancery jurisdiction. Multiplicity of suits. Community of interest. Injunction.*

The jurisdiction of equity to prevent a multiplicity of suits does not extend to enjoining a number of separate suits at law against the same defendant to recover damages, where the plaintiffs have no community of interest, except in the questions of law and fact involved. *Telephone Co. v. Williamson*, 1.

2. *Same.*

In order for equity to take jurisdiction upon the ground of multiplicity of suits, there must be some recognized ground

EQUITY.

EQUITY—Continued. •

of equitable interference or some community of interest in the subject-matter, or a common right or title involved to warrant the joinder of all in one suit or there must be some common purpose in pursuit of a common adversary, where each may resort to equity, in order to be jointed in one suit. *Telephone Co. v. Williamson*, 1.

3. *On suggestion of error. Laches. Delay.*

Laches in legal significance is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or not, within the limits allowed by law, but when a party, knowing his rights, neglects to enforce them until the condition of the other party has in good faith become so changed that he cannot be restored to his former state, if the right be then enforced, delay in such case becomes inequitable and operates as an estoppel against the assertion of the right. *Comans v. Tapley*, 203.

4. *Stale claims. Enforcement.*

A claim is stale in equity and will not be enforced where a bill is filed to amend and enforce a decree rendered forty years before and when it is doubtful whether the different parties affected can now obtain the evidence necessary to a fair presentation of the case on their part, and when the land the subject of controversy has passed for value into the hands of an innocent third party, who had constructive, but no actual knowledge that such suit was pending and who was not in fact guilty of any negligence in not obtaining this knowledge, and where such innocent purchaser would be greatly damaged without any power in the courts to grant her any adequate compensation therefor, and where all of this would have been avoided, had reasonable diligence been exercised by complainants to bring the case to a final determination. *Ib.*

5. *Reformation of deeds. Mistakes.*

A bill in equity will lie for the reformation of a deed and to adjust the equities between the parties, where complainant charges that when he conveyed certain lands to defendant, it was agreed that complainant was not the sole owner of one of the tracts, and that he was conveying only his interest therein, that he left the preparation of the deed to defendant who was an attorney, and assumed that it would be drawn according to their agreement, but that instead the deed contained a warranty, of

EVIDENCE.

EQUITY—Continued.

title as to both tracts and defendant had refused to pay the purchase price because of an alleged breach of warranty. *Eichelberger v. Cooper*, 253.

6. *Equal equities. Bona fide purchasers.*

Where a defendant acquired the legal estate at the time and as a part of his original purchase, the fact of his purchase having been bona fide, for value and without notice, is a perfect defense in equity to any suit brought by the holder of a prior equitable estate, lien, incumbrance or other interest seeking either to establish and enforce his equitable estate, lien or interest, or to obtain any other relief with respect thereto which can be given by a court of equity. *Conn v. Boutwell*, 353.

EVIDENCE.

1. *Criminal law. Trial. Suspicion. Proof.*

A party cannot be convicted of a crime on suspicion alone, however strong and well founded it may be. There must be proof. *Byrd v. City of Hazelhurst*, 57.

2. *Criminal law. Judicial notice. Municipal ordinance.*

Courts will not take judicial notice of municipal ordinances, they must be introduced on the trial. *Thomas v. State*, 74.

3. *Instructions.*

Where there is a material conflict of evidence a peremptory instruction should not be given. *Hooks v. Mills*, 91.

4. *Master and servant. Injuries to servant. Negligence. Question for jury.*

In a suit for the death of a servant while employed as an engineer of a logging train, the questions as to whether the derailment of the train was caused by a defective track, and if so, whether the defect was from the master's negligence were for the jury. *Ib.*

5. *Partnership. Commercial paper. Burden of proof.*

While it is true that when the firm's name is found upon commercial paper, *prima facie* the firm is bound, yet this casts upon the party attempting to escape liability only the burden of showing that the party signing the name of the firm had no power to do so. *Persons v. Oldfield*, 110.

EVIDENCE.

EVIDENCE—Continued.

6. *Criminal law. Character of accused. Particular acts.*

While a witness introduced as to the character of accused for peace or violence can testify as to his general reputation on that subject, it is error to compel him to testify as to the details of a number of independent fights, etc., in which it was claimed that defendant had been engaged. *Neal v. State*, 122.

7. *Keeping liquor for sale. Acts of 1908, chapter 115.*

In a prosecution for keeping liquor for sale under acts of 1908, chapter 115, providing that the fact that any person shall be found in possession of appliances adapted to retailing intoxicating liquors, shall be presumptive evidence that he is keeping for sale intoxicating liquors contrary to law, where the evidence showed that defendant was found in possession of large quantities of intoxicating liquor a part of which was kept concealed, and empty beer bottles in large numbers, and empty glasses with fresh beer in them, corkscrews and beer openers were found, it was a question for the jury whether defendant was keeping intoxicating liquors for sale, although there was testimony tending to show that any liquor drunk on the premises was drunk by friends of defendant, and was not sold. *Minter v. City of Jackson*, 139.

8. *Homicide. Dying declarations. Admissibility.*

The competency of dying declarations is exclusively for the consideration of the court. *Gurley v. State*, 190.

9. *Same.*

Where a dying declaration is admitted in evidence by the court, it then becomes the province of the jury to decide upon its credibility, and the jury in doing so may take into consideration all the circumstances under which the declarations were made, including those already proved to the court and may give to the evidence only such credit or force as, upon the whole they think it deserves. *Ib.*

10. *Criminal law. Circumstantial evidence. Instructions.*

An instruction for the state that a person can be convicted of a crime or misdemeanor on circumstantial evidence is fatally erroneous, where it omits the necessary qualification that such circumstantial evidence, must be sufficient to exclude every other reasonable hypothesis than that of guilt. *Smith v. State*, 283.

EVIDENCE.

EVIDENCE—Continued.

11. Master and servant. Independent contractor. Evidence. Sufficiency.

In a suit by a servant for personal injury, evidence, adduced as shown by the record in this case, held to show that he was the servant of the defendant and was not employed by an independent contractor. *Finkbine Lumber Co. v. Cunningham*, 292.

12. Master and servant. Actions.

In a suit by a servant for personal injuries, where the defendant claimed that the servant was employed by an independent contractor and was not its servant, evidence that the defendant carried accident insurance on the servants of the alleged independent contractor was admissible to show that defendant was the real master and that the alleged contractor was only one of its employees, and furnished strong proof of that fact. *Ib.*

13. Master and servant. Contributory negligence. Question for jury.

The facts in this case held to raise a question for the jury as to plaintiff's contributory negligence. *Ib.*

14. Homicide. Dying declaration.

In order that a dying declaration may be admissible in evidence, it must appear beyond a reasonable doubt, to have been made under the realization and solemn sense of impending death. The deceased at the time of making the declaration, must have had no hope, however slight, of recovery. *Fannie v. State*, 378.

15. Intoxicating liquors. Sale. Time. Code of 1906, section 1762.

Where the state on a trial under an indictment for the unlawful sale of intoxicating liquors, proceeding under Code of 1906, section 1762, introduces evidence of more than one sale, evidence should be given only of sales made "anterior to the day laid in the indictment" for the reason that it is expressly so provided in this section, which alone authorizes the introduction of evidence of more than one sale. *Oliver v. State*, 382.

16. Criminal law. Self-serving declaration. Examination of witnesses.

Where a defendant on trial for the larceny of a steer claimed that he was employed by his brother to drive two steers to market and that he knew nothing about their ownership, except what his brother told him, and that he did not make the sale nor share in the proceeds, but was only paid for driving the cattle, it was reversible error for the court to exclude the testimony of witnesses that accused had stated this to them while driving the

EVIDENCE.

EVIDENCE—Continued.

cattle to market as such declarations were not self-serving, but explanatory of defendant's possession. *Johnston v. State*, 397.

17. *Cross-examination of witnesses. Improper questions.*

It was improper for the district attorney to ask a party charged with crime, if he was not known as "Hangman Johnston" and if he had not hanged forty-three men. *Ib.*

18. *Bail. Consideration in supreme court. Merits.*

In an application for bail, pending an appeal, by a party convicted of a felony, the supreme court will not allow to be introduced as evidence or give any consideration to alleged errors occurring in the trial in the lower court. *Atkinson ex parte*, 744.

19. *Carrying concealed weapons. Criminal prosecution. Defenses. Code 1906, section 1105, paragraph "A."*

A defendant charged with carrying a deadly weapon concealed can, under Code of 1906, section 1105, paragraph "A" so providing, show as a defense that he was threatened and had good reason to and did apprehend an attack and in such case it is not necessary for defendant to prove either that he himself heard or that the party who informed him heard the other party make the threats. The only thing necessary is that the party indicted was informed and so believed that he had been threatened and that he had good and sufficient reason to apprehend a serious attack from the party making the threats and that he did so apprehend. *Hurst v. State*, 402.

20. *Same.*

The question as to the good faith with which a defendant, charged with carrying concealed weapons, carried the weapon is a question for the jury. *Ib.*

21. *Appeal and error. Evidence. Necessity of objection.*

Where no objection was made to the introduction of evidence in the court below, error in its admission is waived. *Fox v. Baggett*, 519.

22. *Admission. Nominal party.*

In a suit by a minor by his father and next friend against a carrier for personal injuries, evidence by the defendant of what the father and next friend of plaintiff said as to obtaining a ticket was not admissible, where it was not shown that the son was present, the father being a mere nominal party to the suit. *Railroad Co. v. Pillows*, 527.

EVIDENCE.

EVIDENCE—Continued.

23. *Carriers. Duty to receive passengers. Admissibility of evidence.*

In an action against a carrier for failure to stop its car and receive a woman and child as passengers, evidence of the motorman as to seeing a woman and child waiting for the car and as to what was done by the conductor and motorman with respect thereto was admissible. *Godfrey v. Railway Co.*, 565.

24. *New trial. Newly discovered evidence. Impeachment. Appellant.*

A motion for a new trial on account of newly discovered evidence was properly overruled where the affidavit accompanying such motion was not signed by the defendant and by only two of his four attorneys and the newly discovered evidence merely tended to impeach the credibility of the witnesses and was merely negative in its character. *Overton v. State*, 607.

25. *Marriage. Sufficiency of evidence.*

In a case involving the validity of a second marriage, testimony of complainant and her son, that in 1878 her former husband was taken sick and carried to the county poorhouse at which time she left him; that she was afterwards informed that he had died; that she took the household effects; that she had never heard of him since and had never doubted his death; that she again married in the year 1883; was sufficient in the absence of any proof to the contrary to establish the validity of the second marriage. *Taylor v. Garrett*, 660.

26. *Best evidence. Secondary evidence. Laying foundation.*

Even against the estate of a decedent a party in interest asserting a claim or defense may testify that she received a letter for the purpose of laying the foundation for the introduction of the letter. *Baldrige v. Stribling*, 666.

27. *Same.*

A copy of a letter cannot be introduced in evidence where there is no evidence accounting for the absence of the original—nothing to show that it was lost or destroyed. *Ib.*

28. *Declarations of deceased persons. Against interest. Hearsay.*

Declarations whether verbal or written made by a deceased person as to facts presumably within his knowledge, if relevant to the matter of inquiry, are admissible in evidence as between third parties.

First. When it appears that the declarant is dead.

EVIDENCE.

EVIDENCE—Continued.

Second. That the declaration was against his pecuniary interest.

Third. That it was a fact in relation to a matter of which he was personally cognizant.

Fourth. That the declarant had no possible motive to falsify the fact declared. *Baldrige v. Stridling*, 666.

29. *Gifts. Undue influence. Burden of proof.*

The burden of proof is upon one seeking to invalidate a gift of money *inter vivos* to show that the gift was induced by undue influence and mere suspicion, however strong, is insufficient upon which to set aside the transaction. *Ib.*

30. *Finding of facts. Conflicting evidence. Verdict of jury.*

Where the evidence is conflicting and the issue was fairly submitted to the jury under proper instructions, their finding is conclusive on appeal. *Railroad Co. v. Moore*, 768.

31. *Damages. Injury to stock. Sufficiency of evidence. Value. Opinion evidence.*

In a suit for damages for killing a cow, it was not error for the court to refuse to allow a witness to answer the question "what would be the value of a cow two and a half years old, light red in color and giving milk," as the question afforded no data from which the witness could have based an intelligent opinion as to value. *Railroad Co. v. Walden*, 781.

32. *Carriers. Transportation of dead bodies. Punitive damages. Sufficiency of evidence.*

In a suit for punitive damages, wherein gross negligence is charged on the part of the railroad employees which resulted in the dropping of a box containing the corpse of plaintiff's child while loading the same into a baggage car, evidence held not sufficient to charge the defendant's employees with wantonness, recklessness or wilfulness, such as to warrant the infliction of punitive damages. *Railroad Co. v. James*, 791.

33. *Master and servant. Injuries. Sufficiency of evidence. Discovered peril. Code 1906, Sec. 1985.*

In a suit for the death of a car inspector against a railroad company by being run over by a switch engine, where the evidence showed that the switch engine was being preceded by a flagman to whom the engineer looked for signals, and where a witness testified that this flagman saw deceased on the track and must have realized that he was unaware of his danger in ample time

FEDERAL CONSTITUTION—FORGERY.

EVIDENCE—Continued.

to have warned him of the approaching engine, or to have signalled the engineer who then could have stopped the engine before it struck deceased. In such case leaving out of view Code 1906, Sec. 1985, altogether, a peremptory instruction for defendant should not be given. *Railroad Co. v. Carraway*, 813.

34. *Same.*

In such case even though deceased was guilty of contributory negligence, if the employees of appellant in charge of the train, after discovering his peril, could by the exercise of reasonable care have avoided inflicting injury it was their duty to do so. *Ib.*

35. *Parol. Contract. Consideration.*

Parol evidence is admissible to explain or even contradict a written contract as to the mere consideration; but when the consideration is contractual, parol evidence is no more admissible to vary that than it is any other part of the written instrument. *Dodge v. Outrer*, 844.

36. *Trial. Peremptory instructions.*

Where the evidence is conflicting on the issue involved, a peremptory instruction should not be given. *Ib.*

FEDERAL CONSTITUTION.

Code of 1906, section 1985. Constitution of United States, Fourteenth Amendment.

Section 1985 of the Code of 1906 is not in conflict with the fourteenth amendment to the federal constitution, in that it does not deprive a railroad company of the equal protection of the laws and of its property without due process of law. *New Orleans, M. & O. R. R. Co. v. Cole*, 173.

FORGERY.

1. *Forgery. Elements of offenses. Banks. Payment of draft on fraudulent endorsement. Liability of bank to owner.*

Where a bank check is payable to the order of a person and another person of the same name of the payee gets hold of it and indorses it to a party who takes it in good faith and for value, such party acquires no title to the check. *Thomas v. Bank*, 500.

FRAUDS—GARNISHMENT.

FORGERY—Continued.

2. *Same.*

If the indorsement in such case is made by a person who is not the real payee, but has the same name as the real payee, is made by such person with full knowledge that he is not the real payee, and with intent to perpetrate a fraud his indorsement is a forgery. *Thomas v. Bank*, 500.

3. *Same.*

Banks taking checks must know the true parties claiming to own them—in fact who do own them, and they act at their peril in paying them. *Ib.*

FRAUDS.

1. *False pretense. Fraud. Necessity for. Code of 1906, Sec. 1166.*

In order to constitute an offense under the Code of 1906, Sec. 1166, punishing every person who with intent to cheat shall designedly by any false token or writing or by any false pretense obtain from a person money etc. the false pretense relied upon for conviction must be accompanied by something more than a mere false statement of a fact whereby money or other valuable thing is obtained from another. Such false statement must also be accompanied by an intent to cheat and defraud the person from whom the money is obtained. *Pittman v. State*, 553.

2. *Evidence. Sufficiency.*

Fraud is not established by raising a mere suspicion. *Willoughby v. Pope*, 808.

3. *Code of 1906, Sec. 4775. Contracts in consideration of marriage.*

An oral agreement by a prospective husband to renounce his interest in the realty of his prospective bride in consideration of marriage is void under Code 1906, Sec. 4775. *Pardue v. Ardis*, 884.

GARNISHMENT.

1. *Justice of the peace. Answer of garnishee. Time of filing. Appeal. Code of 1906, sections 2345-2347.*

Where a party was garnished in a justice of the peace court and failed to answer on the day required by section 2347, Code of 1906, and judgment was rendered against him in said court, he cannot on appeal to the circuit court for the first time make

GRAND JURY—GUARDIAN AND WARD.

GARNISHMENT—Continued.

answer in that court to such garnishment over the objection of the garnishor. *Lumber & Mfg. Co. v. Mallett*, 135.

2. *Same.*

Where in such case the answer of the garnishee is filed without objection and remains on file for a long time the objection will be considered to have been waived. *Ib.*

GRAND JURY.

1. *Excusing members of grand jury. Right of court and of foreman. Effect on indictment. Code 1906, Sec. 2704.*

The foreman of a grand jury has no right to discharge a member after the grand jury has been legally empaneled, but the court can for sufficient reason discharge a part of the grand jury and substitute others and should do so where the discharge of members would reduce the number below fifteen members. *McCoy v. State*, 613.

2. *Same.*

Where after a grand jury of eighteen members was duly empaneled the foreman excused four members, thereby reducing the number to fourteen members, this did not prevent the grand jury from proceeding with business. *Ib.*

3. *Same.*

In view of Code 1906, Sec. 2704, providing that the empaneling of the grand jury shall be conclusive evidence of its competency and qualification and of the common law rule, that to render an indictment valid, it is only necessary that twelve of the grand jurors consent, an indictment voted for and returned by only twelve members of a legally constituted grand jury is valid. *Ib.*

GUARDIAN AND WARD.

1. *Bond. Liability covered. Conversion. Bond given after actual conversion. Code 1906, Sec. 2407.*

Where a chancery court proceeding under Sec. 2407, Code of 1906, requires a guardian to execute a new bond, such new bond has no retrospective effect unless such bond plainly indicates an intention that it should have such effect. *Indemnity Co. v. State for use of Gillaspv*, 703.

HUSBAND AND WIFE.

GUARDIAN AND WARD—Continued.

2. *Same.*

Where it is plain that a guardian converted the funds of his ward to his own use while acting as guardian under the first bond and afterwards gives a second bond, the sureties on the second bond are not liable for such conversion but the sureties on the first bond are liable. *Indemnity Co. v. State for use of Gillaspy*, 703.

3. *Same.*

Where when the second bond was given the actual conversion of the wards' property had taken place under the first bond, but the guardian was solvent and fully able to pay the amount then due the wards and the amount was lost to them because the guardian failed and neglected to pay over the amount to them as he should have done, in such case the sureties on the second bond are liable, as well as the sureties on the first bond. *Ib.*

4. *Guardian ad litem. Next friend. Actions.*

When a person bringing suit for a minor ward styles himself in the pleadings as "guardian *ad litem*," when in fact he is suing as "next friend," he will be treated as such and the courts will not look with critical eyes on the characterization which the next friend chooses to give himself in the pleadings. *Ib.*

HUSBAND AND WIFE.

1. *Gifts. Validity. Code 1906, section 2522, Statutes, Construction. Intent.*

A gift by a husband to his wife of a personal ornament, clothing and wearing apparel suitable to her condition in life, is valid as against a third person, although such gift is not evidenced by a written instrument, acknowledged and recorded as provided by section 2522, Code 1906. *Kennington v. Hemingway*, 259.

2. *Contracts for benefit of third parties. Pleading. Matters of Implication.*

Where a contract is made with a carrier by a wife for her husband's benefit the husband has a right to bring suit for its breach in his own name. *Canada v. Y. & M. V. R. R. Co.*, 274.

3. *Estate conveyed. Estate of entirety. Survivorship.*

Where a deed was executed in the year 1861 conveying lands to a husband and his wife, under the law then in force, it conveyed to them an estate by entirety and consequently on the death of either the other became the sole owner and may convey the fee of the land therein described. *Elks & Co. v. Walker*, 326.

INDICTMENT.

HUSBAND AND WIFE—Continued.

4. *Same.*

In such case the fact that the word "his" is used instead of "their" in habendum clause is immaterial as this was merely a clerical error. *Ib.*

5. *Conveyance. Code of 1906, section 2770. Bona fide purchaser. Infants. Ejectment. Equal equities.*

Under section 2770, Code of 1906, which has been the law in this state since the adoption of the Code of 1880 and which provides that "all conveyances or demises of land made to two or more persons or to a husband and wife, shall be construed to create estates in common, and not in joint tenancy or entirety, unless it manifestly appears from the tenor of the instrument, that it was intended to create an estate in joint tenancy or entirety with the right of survivorship," a deed to a husband and his wife creates an estate in common and each owns an undivided one-half interest in the land. *Conn v. Boutwell*, 353.

6. *Statutes of frauds. Code 1906, Sec. 4775. Contracts in consideration of marriage.*

An oral agreement by a prospective husband to renounce his interest in the realty of his prospective bride in consideration of marriage is void under Code 1906, Sec. 4775. *Pardue v. Ardis*, 884.

INDICTMENT.

1. *Perjury. Variance.*

An indictment for perjury charging a person with having sworn that "he did not buy certain things" where the evidence shows that the testimony was "that he didn't remember whether he bought or not, that he couldn't recollect," is a fatal variance. *Willoughby v. State*, 60.

2. *Same.*

In order for a conviction to be good in such case the indictment should have alleged substantially what the witness testified to in court, coupled with an averment that in truth and in fact the witness did remember of having bought the thing, that he did recollect of having done so, or words to that effect. *Ib.*

3. *Amendment after proof. Code 1906, section 1508.*

On motion of the district attorney, in order that the indictment might conform to the proof, it was permissible for the court

INDICTMENT.

INDICTMENT—Continued.

under Code 1906, section 1508, to allow an indictment to be amended by inserting the words "and district" between the words "county" and "aforesaid," making the indictment read "in the county and district aforesaid." *Winston v. State*, 101.

4. *Exhibiting deadly weapons. Requisites. Code of 1906, section 1110.*

An indictment charging the exhibition of deadly weapons under Code of 1906, section 1110 must allege that the exhibition was "in the presence of three or more persons" as these words are essential and such defect in the indictment is not cured by evidence that three or more persons were present when accused exhibited the weapon. *Parrett v. State*, 306.

5. *Trespass. Sufficiency. Code of 1906, section 1394.*

An indictment for trespass drawn under Code of 1906, section 1394, is fatally defective, which fails to allege, either that defendant went upon the inclosed land of another without his consent, after having been notified by such person or his agent not to do so, or that he remained on such land after a notification by such person or his agent to depart. *Rube v. State*, 362.

6. *Intoxicating liquors. Sale. Variance. Time. Code of 1906, Sections 1428-1762.*

Under the Code of 1906, section 1428, so providing, the day on which an offense is charged in an indictment to have been committed is immaterial, except in those cases where time is of the essence of the offense or a necessary ingredient of its description, and hence, in a case not within this exception, proof that the offense was committed either before or after the day laid in the indictment, but before the indictment was found and within the period prescribed by the statute of limitations, is sufficient. *Oliver v. State*, 382.

7. *Criminal law. Indictment for selling liquors. Code 1906, sections 1763-5032. Laws of 1908, chapters 113-114-115.*

Where a party was indicted under Code of 1906, section 5032, for the sale of vinous, alcoholic and intoxicating liquors, in less quantities than one gallon, within five miles of the University of Mississippi, such indictment was a nullity as this section of the Code was repealed by chapters 113-114-115 of the Laws of 1908. *Wilburn v. State*, 392.

8. *Same.*

Where an indictment is void, charging no offense at all, the court is without power to permit an amendment thereof. *Ib.*

INJUNCTION.

INDICTMENT—Continued.

9. *Successive offenses.*

No person can be punished for a second or third violation if a severer punishment is to be imposed unless the indictment or affidavit so charge. *Britton v. State*, 584.

10. *Same.*

If the indictment does not charge that the offense is a second or third offense, the court will presume it to be a first offense always and inflict punishment accordingly. *Ib.*

11. *Grand jury. Examining members. Right of court and of foreman. Code 1906, Sec. 2704.*

In view of Code 1906, Sec. 2704, providing that the empaneling of the grand jury shall be conclusive evidence of its competency and qualification and of the common law rule, that to render an indictment valid, it is only necessary that twelve of the grand jurors consent, an indictment voted for and returned by only twelve members of a legally constituted grand jury is valid. *McCoy v. State*, 613.

12. *Criminal law. Former jeopardy.*

A former conviction before a justice of the peace competent to try the case is a bar to an indictment for the identical offense subsequently presented in the circuit court. *Smith v. State*, 853.

13. *Intoxicating liquors. Sale. Variance. Code 1906, Secs. 1746-1773. Laws 1908, Ch. 115.*

Where a defendant is indicted under Code of 1906, Sec. 1746, as amended by Laws 1908, Ch. 115, generally for selling intoxicating liquors in a certain county, the fact that the evidence develops that the sale was made at a "place of amusement," which is punished under Sec. 1773, Code of 1906, as amended by Laws of 1908, Ch. 115, did not constitute a variance and defendant was properly sentenced under the former section. *Taylor v. State*, 857.

INJUNCTION.

1. *Chancery jurisdiction. Multiplicity of suits. Community of interest.*

The jurisdiction of equity to prevent a multiplicity of suits does not extend to enjoining a number of separate suits at law against the same defendant to recover damages, where the plaintiffs have no community of interest, except in the question of law and fact involved. *Telephone Co. v. Williamson*, 1.

INSTRUCTIONS.

INJUNCTION—Continued.

2. *Motion to dissolve. Final hearing.*

A temporary injunction should not be dissolved on motion, but retained for final hearing on full proof where such a course is necessary to do complete justice between the parties. *Evans v. Hove*, 244.

INSTRUCTIONS.1. *Evidence.*

Where there is a material conflict of evidence a peremptory instruction should not be given. *Hooks v. Mills*, 91.

2. *Master and servant. Injury to servant.*

In an action for the death of an engineer employed on a dummy line, an instruction that the fact that the deceased had a right to direct the trackmen where to work would not imply that he had an opportunity to judge of the sufficiency of the work after it was done, should not have been given, because it singled out and gave undue prominence to the fact that deceased's duties as engineer were probably inconsistent with the duty of attending to the repairing of the track, and such an instruction is also improper as a charge on the weight of the evidence. *Ib.*

3. *Conformity to evidence.*

In a suit for the death of a servant an instruction "that no proposition or suggestion on the part of the master made to deceased with respect to deceased assuming charge of or responsibility for the maintenance of the roadbed of the railroad, can put that duty upon the deceased unless he did in fact undertake to assume this duty, should not be given where the proposition came from the deceased and not the master. *Ib.*

4. *Supreme court. Exceptions. Stenographer's notes.*

Where a peremptory instruction was given by the court and so marked and filed by the clerk, and no motion for a new trial was made, but an exception to the action of the court in granting this instruction was taken at the time, it was given and in due course, a bill of exceptions consisting of the stenographer's notes, embodying all of the evidence was filed, it became a part of the record and was reviewable on appeal without a motion for a new trial. *McCorkle v. T. C. R. R. Co.*, 124.

5. *Appeal and error. Harmless error.*

Where a party to a suit obtains a judgment he cannot complain that the court refused to give him a peremptory instruction, for

INSTRUCTIONS.

INSTRUCTIONS—Continued.

the jury have done what the party requested the court to peremptorily charge them to do. *New Orleans, M. & O. R. R. Co. v. Oole*, 174.

6. *Appeal and error. Review. Harmless error.*

A party cannot complain of an erroneous instruction where instructions were given at his request embodying the same principle. *Ib.*

7. *Homicide. Dying declarations. Admissibility.*

Where a dying declaration is admitted in evidence by the court, it then becomes the province of the jury to decide upon its credibility, and the jury in doing so may take into consideration all the circumstances under which the declarations were made, including those already proved to the court and may give to the evidence only such credit or force as, upon the whole they think it deserves. *Gurley v. State*, 190.

8. *Same.*

The courts should not single out particular portions of the evidence in a cause, and tell the jury by instructions, that it ought or might consider this, that, or another part of the evidence, in connection, with the other evidence in reaching a verdict. *Ib.*

9. *Criminal law. Circumstantial evidence.*

An instruction for the state that a person can be convicted of a crime or misdemeanor on circumstantial evidence is fatally erroneous, where it omits the necessary qualification that such circumstantial evidence, must be sufficient to exclude every other reasonable hypothesis than that of guilt. *Smith v. State*, 283.

10. *Intoxicating liquors. Wrongful sale.*

Where on the trial of accused for the unlawful sale of whiskey a witness testified for the state that he and accused had agreed that accused should order whiskey for them both from Slidell, Louisiana, and that in accordance with this agreement witness gave accused one dollar and accused ordered two quarts of whiskey, one of which he gave witness in accordance with their agreement, an instruction that if the jury believed that the witness gave defendant a dollar and about three weeks later defendant delivered to witness a quart of whiskey, he was guilty, was erroneous, since if the witness' testimony was true, defendant did not sell the whiskey but simply acted as agent in effecting a purchase for the commission of which crime accused was not on trial. *Compton v. State*, 303.

INSTRUCTIONS.

INSTRUCTIONS—Continued.

11. *Master and servant. Injuries to servant. Trial.*

In a suit by the engineer of a passenger train against a railroad for personal injury caused by running into an open switch, negligently left open by a freight train brakeman, an instruction that if the "railroad or its employees" were guilty of negligence was not objectionable in that it did not point out what employees were negligent, where the single act of negligence charged was the leaving of the switch open and the only servant of the defendant who could have been guilty of any negligence at all was either the brakeman or conductor in charge of the freight train. *St. Louis & S. F. R. Co. v. Ault*, 341.

12. *Same.*

Common sense and not hypercriticism should govern the court in passing upon instructions given or refused. *Ib.*

13. *Appeal and error. Objections to instructions. Applicability to issue.*

Where instructions, applicable to the evidence, are objected to because not applicable to the issue made by the pleadings, this objection should be made when the instructions are presented for then an immediate amendment of the pleadings can be had, and if not so made will not be considered in the supreme court on appeal. *Railroad Co. v. Pillows*, 527.

14. *Assumption.*

An instruction which assumes as true a controverted fact is erroneous. *Godfrey v. Railway Co.*, 560.

15. *Cured by others.*

Where an abstract proposition of law is announced by an instruction and the same or similar propositions of law are thereafter correctly set forth in other instructions in the cause, then if taking the instructions on both sides as a whole, the court can safely affirm that no harm has been done to either side, and that the right result has been reached, the verdict of the jury will not, in such cases be disturbed. *Ib.*

16. *Same.*

But where the court undertakes to collect certain facts, and making a concrete application of the law to such facts, instructs the jury to bring in a stated verdict if they believe in their existence, and the facts therein stated will not legally sustain the verdict directed, such error cannot be cured by other instructions. *Ib.*

INSURANCE.

INSTRUCTIONS—Continued.

17. *Harmless error.*

Where instructions were too liberal for defendant, he cannot complain. *Railroad Co. v. Moore*, 768.

18. *Railroads. Harmless error.*

In an action for damages for the death of a party struck by a train, an instruction that the jury might consider the pain and suffering of the deceased as "shown by the record" up to the time of his death, and there was no evidence from which the jury could infer that such death was other than instantaneous, the giving of such instruction was harmless, where from the entire record and the amount of the verdict it can be seen to have had no prejudicial effect. *Ib.*

19. *Punitive damages. Definition.*

It is not necessary that the jury should be instructed as to what constitutes punitive damages; it is presumed that the jury understands what is meant by punitive damages as much as they understand what is meant by actual or compensatory damages. *Ib.*

20. *Same.*

An instruction to the jury as to their right to, inflict punitive damages is not improper for failure to define what "punitive" damages are, in the absence of a request for such a definition. *Ib.*

21. *Trial. Peremptory instructions. Evidence.*

Where the evidence is conflicting on the issue involved, a peremptory instruction should not be given. *Dodge v. Outrer*, 844.

INSURANCE.

1. *Beneficiaries. Wills.*

A person insured in a mutual benefit association cannot make a valid bequest of the benefits, to one who does not belong to the class of persons who are authorized to become beneficiaries under the laws, constitution and charter of such order. *Hawkins v. Duberry*, 17.

2. *Mutual. Forfeiture of policy. Non-payment of dues.*

Where the Constitution and by-laws of a mutual benefit association provides that a member who does not pay a monthly assessment

INTERSTATE COMMERCE—INTOXICATING LIQUORS.

INSURANCE—Continued.

by the 15th day of the month in which it becomes due shall *ipso facto* forfeit his membership in the association and his policy become cancelled, a certificate was forfeited where the monthly dues were not tendered until after insured's death which occurred after the 15th of the month. *Odd Fellows Benefit Assn. v. Smith*, 332.

3. *Mutual. Knowledge of constitution and by-laws.*

The secretary of a local lodge of a mutual benefit association is its agent for the purpose of collecting its monthly assessments and his authority to do so is derived from and limited by its Constitution and by-laws with notice of which assured is charged for the reason that they constitute a part of his contract of insurance. *Ib.*

4. *Mutual. Waiver of forfeiture. Custom of local agents.*

Where it is not shown that any general officer of a mutual benefit association had any knowledge that its local agents habitually accepted dues after they were due under its Constitution and by-laws, the association did not acquiesce, in such custom, so as to waive a forfeiture of the contract of insurance for nonpayment of dues in time. *Ib.*

5. *Actions. Limitations by contract. Code of 1906, Secs. 2575, 3126, 3127. Constitution 1890, Sec. 87.*

Code 1906, Sec. 2575, providing that conditions or stipulations in insurance contracts limiting the time within which suit may be brought thereon to less than one year, shall be void does not prevent such contractual limitation for a period of not less than one year. *Taylor v. Insurance Co.*, 480.

INTERSTATE COMMERCE.

Privilege tax.

A state cannot impose a tax on the privilege of operating a ferry engaged exclusively in carrying passengers across a river from one state to another, as this would be a burden on interstate commerce. *Ferry Co. v. State*, 65.

INTOXICATING LIQUORS.

1. *Wrongful sale. Instructions.*

Where on the trial of accused for the unlawful sale of whiskey a witness testified for the state that he and accused had agreed

JUDGMENTS AND DECREES.

INTOXICATING LIQUORS—Continued.

that accused should order whiskey for them both from Slidell, Louisiana, and that in accordance with this agreement witness gave accused one dollar and accused ordered two quarts of whiskey, one of which he gave witness in accordance with their agreement, an instruction that if the jury believed that the witness gave defendant a dollar and about three weeks later defendant delivered to witness a quart of whiskey, he was guilty, was erroneous, since if the witness' testimony was true, defendant did not sell the whiskey but simply acted as agent in effecting a purchase for the commission of which crime accused was not on trial. *Compton v. State*, 303.

2. *Sale. Indictment. Variance. Code 1906, Secs. 1746-1773. Laws 1908, Ch. 115.*

Where a defendant is indicted under Code of 1906, Sec. 1746, as amended by Laws 1908, Ch. 115, generally for selling intoxicating liquors in a certain county, the fact that the evidence develops that the sale was made at a "place of amusement," which is punished under Sec. 1773, Code of 1906, as amended by Laws of 1908, Ch. 115, did not constitute a variance and defendant was properly sentenced under the former section. *Taylor v. State*, 857.

JUDGMENTS AND DECREES.

1. *Justice of the peace. Jurisdiction. Remittitur.*

The affidavit on which replevin is begun, before a justice of the peace, is not only the basis for the issuance of the writ, but also the written statement of the plaintiff's cause of action and he cannot recover judgment for a greater value than alleged therein. *Johnson v. Tabor*, 78.

2. *Chattel mortgages. Liens. Priority.*

A judgment lien takes effect on a growing crop only from the time it has an actual existence, the lien does not relate back to the rendition or enrollment of the judgment; but a lien of a mortgage on a growing crop relates back to the date of its creation and takes effect from the date of the execution of the mortgage, thereby taking precedence of a judgment. *Candler v. Cromwell*, 161.

3. *Rights of judgment creditor.*

A judgment creditor succeeds to only such rights in the judgment debtor's property as the judgment debtor actually has,

JUDGMENTS AND DECREES.

JUDGMENTS AND DECREES—Continued.

and is barred by all the equities which bar the judgment debtor, and can assert no demand that the judgment debtor is precluded from asserting. *Candler v. Cromwell*, 161.

4. *Recitals. Conclusiveness. Abatement and Revival. Final decree. Interlocutory decree.*

In the absence of evidence to the contrary a recital in a decree that a party was defendant in the suit is conclusive of that fact. *Comans v. Tapley*, 203.

5. *Final decree. Interlocutory decree.*

An interlocutory decree is one made pending the cause, and before a final hearing on the merits. A final decree is one which disposes of the cause, either by sending it out of the court, before a hearing is had on the merits, or after a hearing on the merits decreeing either in favor of or against the prayer of the bill. *Ib.*

6. *Abatement and revival fine or revival.*

A decree in a suit to cancel a sale by a mortgagee in possession and a sale by him as administrator of the purchaser and for an accounting, which cancels the sale, orders an accounting, appoints a commissioner to take an accounting, and reserves other questions until the coming in of the report of the commissioner, is not a final decree from which an appeal should have been taken within the time limited by the statute, so that a failure to appeal would bar a right to revive the action after the death of the parties thereto, but was an interlocutory decree. *Ib.*

7. *Decisions reviewable. Interlocutory decree. Code of 1906, Sec. 35.*

A decree ordering a sale of lands for partition is an interlocutory decree. *Sowell v. Sowell*, 623.

8. *Operative as bar. Prospective damages.*

A declaration, upon which a former recovery was had for damages for a continuing nuisance caused by the erection of an embankment which stopped the natural drainage of water and caused it to overflow plaintiff's land, did not seek to recover prospective damages, although it alleged that the land was permanently damaged; this simply meant that the damage then accrued was permanent that the reduction in the value of the land was permanent and such former recovery is not a bar to damages afterwards accruing from subsequent overflows. *Rosamond v. Carroll County*, 701.

JURISDICTION.

JUDGMENTS AND DECREES—Continued.

9. *Crops. Title. Judgment lien.*

Working a crop does not give the worker title to the crop, and does not subject the product of his labor to the judgment lien of his creditor. *Willoughby v. Pope*, 808.

JURISDICTION.

1. *Multiplicity of suits. Community of interest. Injunction.*

The jurisdiction of equity to prevent a multiplicity of suits does not extend to enjoining a number of separate suits at law against the same defendant to recover damages, where the plaintiffs have no community of interest, except in the question of law and fact involved. *Telephone Co. v. Williamson*, 1.

2. *Same.*

In order for equity to take jurisdiction upon the ground of multiplicity of suits, there must be some recognized ground of equitable interference or some community of interest in the subject-matter, or a common right or title involved to warrant the joinder of all in one suit or there must be some common purpose in pursuit of a common adversary, where each may resort to equity, in order to be joined in one suit. *Ib.*

3. *Same.*

Where there is an injury continuing in its nature, which results in the bringing of numerous suits against a person, equity will intervene to prevent a multiplicity of suits. *Ib.*

4. *Justice of the peace. Affidavit.*

The test of the jurisdiction of a justice of the peace in an action of replevin is not the value of the property as found by the jury, but the value as alleged in the affidavit, unless the property therein is knowingly over-valued or under-valued for jurisdictional purposes. *Johnson v. Tabor*, 78.

5. *Venue. Proof. Judicial district. Code of 1906, section 1401.*

Where there are two judicial districts in a county, on the trial of an offense it must affirmatively appear, not only that the offense was committed, but that it was committed in the judicial district in which the indictment charges it to have been committed or else there is no jurisdiction shown in the court to try the case. *Isabel v. State*, 371.

JURISDICTION.

JURISDICTION—Continued.

6. *Same.*

When the law creates two judicial districts in any county, the effect is the same as to jurisdiction as if there were two counties. *Isabel v. State*, 371.

7. *Same.*

Code 1906, section 1401 which provides that where the evidence makes it doubtful in which of several counties the offense is committed, such doubt shall not avail to secure the acquittal of defendant, has no application where there is no attempt to prove the place of the offense. *Ib.*

8. *Same.*

If the proof offered placed the commission of the offense so close to both judicial districts as to leave it in doubt as to which it actually occurred in; whether the first or the second district, Code of 1906, section 1401 would apply. *Ib.*

9. *Appeal and error. Review. Constitutional questions. Matters not necessary to decision. Constitution 1890, Sec. 147. Code 1906, Sec. 5004. Laws 1908, Ch. 204. Interlocutory order. Civil Cause.*

Under Constitution 1890, Sec. 147, providing that no judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, etc., but that if the supreme court shall find error in the proceedings other than as to jurisdiction and it shall be necessary to remand the case, the supreme court may remand it to that court which in its opinion can best determine the controversy; the question of the constitutionality of the laws of 1908, chapter 204, conferring jurisdiction upon chancery courts of suits for penalties for violation of anti-trust laws, will not be determined unless the supreme court should reverse the decree of the court below for some reason other than that the cause was not of equity jurisdiction. *Dukate v. Adams*, 433.

10. *Same.*

Sec. 147 of the Constitution of 1890, applies to appeals to settle the principles of the case as well as to appeals from final decrees. *Ib.*

11. *Appeal and error. "Civil cause." Code 1906, Secs. 5004-1589. Constitution 1890, Sec. 147.*

Notwithstanding the fact that Sec. 5004, Code 1906, imposing a penalty for violation of the anti-trust laws, refers to the viola-

JURISDICTION.

JURISDICTION—Continued.

tion of such laws as an "offense" and requires the circuit judges to call the attention of the grand jury to this provision, and section 1589 provides that "offense" when used in the statutes shall mean any violation of law liable to punishment by criminal prosecution; still as the penalty is to be recovered in an action in the name of the state on the relation of the attorney-general or district attorney, such action is a "civil" rather than a "criminal" action within Sec. 147 of the Constitution of 1890, providing that no judgment shall be reversed for error in bringing the same in equity or law, and an action for the penalty will not be reversed because brought in the chancery court. *Ib.*

12. *Appeal and error. Supersedeas bond. Dismissal. Liability on bond.*

The supreme court has no jurisdiction to discharge a *supersedeas* bond on motion where such bond has served the purpose for which it was given, on the grounds that the sureties were misled into signing it and that one of them notified the clerk before the bond was filed not to approve it, nor could the supreme court discharge such bond on an original proceeding in said court. *Douglas v. Parsons-May-Oberschmidt Co.*, 620.

13. *Bail. Pending appeal. Jurisdiction of supreme court. Code 1906, Sec. 67. Constitution 1890, Sec. 146.*

Under the Constitution of 1890, Sec. 146, providing that the supreme court shall have such jurisdiction, as properly belongs to an appellate court, and Code of 1906, Sec. 67, giving said court or a judge thereof power to grant bail after conviction of a felony, pending appeal, such power is revisory only and should not be exercised until the petition for bail has first been acted on by the lower court. *Atkinson ex parte*, 744.

14. *Criminal law. Courts.*

Where concurrent jurisdiction is vested in two courts, the court first acquiring jurisdiction, acquires exclusive jurisdiction and if a proceeding is instituted in another court about the same subject-matter after one of the courts of concurrent jurisdiction has acquired control, the suit should be dismissed in the last court to acquire jurisdiction. *Rogers v. State*, 847.

15. *Same.*

When one court of concurrent jurisdiction, has acquired jurisdiction, and voluntarily relinquishes it by *nolle pros* or dismissal of the case, the other court can proceed with the case. *Ib.*

LACHES—LANDLORD AND TENANT.

JURISDICTION—Continued.

16. *Same.*

Where a criminal prosecution was pending in a justice court when an indictment for the same offense was returned in the circuit court, and the proceeding in the justice court was then dismissed, it was proper to proceed under the indictment in the circuit court. *Rogers v. State*, 847.

17. *Criminal law. Affidavit.*

A justice of the peace can not acquire jurisdiction to try an accused where no affidavit has been lodged with him, charging an offense. *Taylor v. State*, 857.

LACHES.

On suggestion of error. Delay. Equity.

Laches in legal significance is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or not, within the limits allowed by law, but when a party, knowing his rights, neglects to enforce them until the condition of the other party has in good faith become so changed that he can not be restored to his former state, if the right be then enforced, delay in such case becomes inequitable and operates as an estoppel against the assertion of the right. *Comans v. Tapley*, 203.

LANDLORD AND TENANT.

1. *Existence of relation. Bond for title. Rights of landlord. Lien on crops for rent. Equitable estoppel.*

Where the vendor of land executed a bond for title to the vendee, and put him in possession, the bond providing that the vendee should pay interest on the purchase money and that in case the purchase money was not paid promptly at maturity that the vendee should pay rent to an amount equal to the interest, on the vendee's failure to pay the purchase money, the vendor thereby became landlord and had a right to collect rent to an amount equal to the interest. *Robinson Co. v. Weathersby*, 724.

2. *Same.*

In such case the vendor as landlord can enforce a lien for rent and supplies against a *bona fide* purchaser for value of the crops raised by the tenant on the land and a failure of the vendor to notify one extending credit to the tenant in reliance on his

 LIABILITY.

LANDLORD AND TENANT—Continued.

crops, did not estop the vendor from subjecting the crops to his lien as landlord, though the bond for title was not recorded. *Ib.*

 3. *Same.*

In such case the possession of the tenant under the bond was notice of its contents and there was no duty on the part of the vendor, landlord, to notify the creditor that he was extending credit at his own risk to the tenant. *Ib.*

LAWS (OTHER THAN CODE SECTIONS) CONSTRUED.

1900, ch. 88. Corporations. Sales of stock. Trust. Notes. Liability of maker. *Kelly v. Bank*, 692.

1908, ch. 96. Priority of State as creditor. Statutes in derogation of sovereignty. Construction. Depositaries. Subrogation. Right of surety. *Potter v. Fidelity & Deposit Co.*, 823.

1908, chs. 113-114-115. Criminal law. Indictment for selling intoxicating liquors. *Wilburn v. State*, 392.

1908, ch. 115. Keeping liquor for sale. Evidence. *Minter v. City of Jackson*, 139.

1908, ch. 115—1912, ch. 214. Intoxicating liquors. Change of statute. Increase of penalty. Right to object. Prosecution. *Britton v. State*, 584.

1908, ch. 115. Intoxicating liquors. Sale. Indictment. Variance. *Taylor v. State*, 857.

1908, ch. 118. Bucket shops. *Ascher & Baxter v. Moyse & Co.*, 36.

1908, ch. 147. Special laws. Drainage. Natural watercourses. *Crenshaw v. State*, 457.

1908, ch. 192. Licenses. Commerce. Privilege tax. Statutes. Constitution United States, art. 1, secs. 8-10. Constitution Miss., sec. 112. *Canning Co. v. State*, 890.

LIABILITY.

 1. *Principal and agent. Malicious prosecution. Liability for agent's acts.*

The principal is liable for the acts of his agent in instituting a criminal prosecution maliciously and without probable cause, if the institution of such prosecution was expressly authorized or subsequently ratified by the principal, or was within the scope of the agent's employment. *Fisher v. Westmoreland*, 180.

 2. *Sales. Suit for price. Liability.*

Where plaintiffs' agent took an order from of wire and also took orders from several

Defendant for a bill
hers for wire and

LIBEL—MANDAMUS.

LIABILITY—Continued.

shipped the total amount to defendant without his knowledge and defendant by agreement with the agent paid the freight on the whole shipment, a part of which was refunded to him by the selling agent, and defendant took from the carrier's station the part of the goods which he had ordered, in such case defendant was not liable for the total shipment but only for the part he had ordered and taken out. *Sumrall v. Kitzelman Bros.*, 783.

3. *Agent's authority. Third person.*

Where an agent authorized to sell but not to collect, sells goods to a purchaser and collects the purchase money but fails to turn it over to his principal, the purchaser is not released thereby as he dealt with the agent at his peril; he should have inquired and satisfied himself as to the agent's authority to collect. *Ib.*

LIBEL.

1. *Right of action. Defenses. Apology. Mitigation of damages. Code 1906, Sec. 10.*

In a suit for damages against a principal for defamatory words spoken by an agent while engaged in his master's business, an apology made by the principal not by reason of any promise expressed or implied, that it would constitute full reparation for the injury inflicted, cannot be pleaded in bar of the action, but is admissible in evidence and can be considered by the jury in mitigation of damages. *Fire Insurance Co. v. Betty*, 880.

2. *Principal and agent. Code of 1906, Sec. 10.*

Code 1906, Sec. 10, by which certain words are made actionable has no application in a suit to hold a principal liable for words spoken by an agent unless possibly such words are spoken at the command of the principal. *Ib.*

LIFE ESTATES.

Tax sale. Right to purchase. Wife of tenant.

A husband cannot assert a tax title against his remainderman or tenant in common, and the same disability attaches to his wife and her purchase of a tax title in such case operates as a redemption of the land for the interest of the life tenant and remainderman. *Whitfield v. Miles*, 734.

MANDAMUS.

1. *Operation of street railroad. Judgment. Collateral attack.*

Where a street railroad, operating its road along a public highway under a franchise from the board of supervisors, ceased to

MASTER AND SERVANT.

MANDAMUS—Continued.

operate a portion of the same and the board of supervisors declared the abandoned tracks a nuisance and ordered their removal from the highway, which was accordingly done, mandamus will not lie to compel the company to operate its cars on the abandoned tracks, though the action of the board was unwise or induced by fraud. *Wright v. Railroad*, 470.

2. *Same.*

Such order of the board of supervisors for the removal of the abandoned tracks cannot be attacked collaterally in a mandamus proceeding. *Ib.*

MASTER AND SERVANT.

1. *Injuries to servant. Negligence. Question for jury.*

In a suit for the death of a servant while employed as an engineer of a logging train, the questions as to whether the derailment of the train was caused by a defective track, and if so, whether the defect was from the master's negligence were for the jury. *Hooks v. Mills*, 91.

2. *Injury to servant. Delegation of duty.*

Where the defective condition of the track of a dummy line was caused by deceased's own negligence, for the reason that, at his request, he had been given entire supervision of the track and that it thereby became his duty, not only to direct the trackmen where to work but also to inspect their work and see that it was properly done, the master is not liable, even though deceased was not an expert as to the safety of the railroad track. *Ib.*

3. *Injury to servant. Instructions.*

In an action for the death of an engineer employed on a dummy line, an instruction that the fact that the deceased had a right to direct the trackmen where to work would not imply that he had an opportunity to judge of the sufficiency of the work after it was done, should not have been given, because it singled out and gave undue prominence to the fact that deceased's duties as engineer were probably inconsistent with the duty of attending to the repairing of the track, and such an instruction is also improper as a charge on the weight of the evidence. *Ib.*

4. *Instructions. Conformity to evidence.*

In a suit for the death of a servant an instruction "that no proposition or suggestion on the part of the master made to deceased

MASTER AND SERVANT.

MASTER AND SERVANT—Continued.

with respect to deceased assuming charge of or responsibility for the maintenance of the roadbed of the railroad, can put that duty upon the deceased unless he did in fact undertake to assume this duty, should not be given where the proposition came from the deceased and not the master. *Hooks v. Mills*, 91.

5. *Injury to servant. Safe place to work.*

A "person operating a railroad" does not owe to his servants the duty "to all times have and maintain a safe roadbed." The duty of the master to furnish the servant with a safe place to work is not absolute, but it is simply to exercise reasonable care to furnish the servant with a reasonably safe place in which to work. *Ib.*

6. *Independent contractor. Evidence. Sufficiency.*

In a suit by a servant for personal injury, evidence, adduced as shown by the record in this case, held to show that he was the servant of the defendant and was not employed by an independent contractor. *Finkbine Lumber Co. v. Cunningham*, 292.

7. *Actions. Evidence.*

In a suit by a servant for personal injuries, where the defendant claimed that the servant was employed by an independent contractor and was not its servant, evidence that the defendant carried accident insurance on the servants of the alleged independent contractor was admissible to show that defendant was the real master and that the alleged contractor was only one of its employees, and furnished strong proof of that fact. *Ib.*

8. *Contributory negligence. Question for jury.*

The facts in this case held to raise a question for the jury as to plaintiff's contributory negligence. *Ib.*

9. *Safe place. Continuing duty.*

The duty of the master to furnish his servant a reasonably safe place to work is a continuing duty, it is not satisfied by putting the place in a reasonably safe condition once, and then allowing it to become dangerous while the servant is at work, but it must be reasonably safe at all times. *Ib.*

10. *Nondelegable duty. Fellow-servants.*

The duty of the master to furnish his servant a safe place to work and to keep it safe is nondelegable, and the failure of an employee charged with this duty to keep it in that condition was the failure of the master which he could not shift to any other employee. *Ib.*

MORTGAGES.

MASTER AND SERVANT—Continued.

11. *Injuries to servant. Instructions. Trial.*

In a suit by the engineer of a passenger train against a railroad for personal injury caused by running into an open switch, negligently left open by a freight train brakeman, an instruction that if the "railroad or its employees" were guilty of negligence was not objectionable in that it did not point out what employees were negligent, where the single act of negligence charged was the leaving of the switch open and the only servant of the defendant who could have been guilty of any negligence at all was either the brakeman or conductor in charge of the freight train. *St. Louis & S. F. R. Co. v. Ault*, 341.

MORTGAGES.

1. *On growing crops. Amount secured.*

When a trust deed specifies that the mortgagee will furnish a specified sum, followed by the words "more or less," it does not fix any limitation on the lien which is created by the mortgage, in case the mortgagee, with the assent of the mortgagor, exceeded the amount actually named in the face of the mortgage and when the mortgagor and mortgagee have agreed, by the mortgagee furnishing and the mortgagor accepting the excess furnished, there is no field for speculation as to what was meant in the contract by the use of the words "more or less," because the parties to the contract have definitely settled it, and when no fraud is charged third parties have no right to complain. *Candler v. Cromwell*, 161.

2. *Same.*

The courts construe doubtful contracts when the parties themselves cannot agree as to the true meaning; but when the parties agree, and the contract is made certain, there is no field for interference by the court. *Ib.*

3. *Chattel. Definiteness. Future advances.*

A mortgage to secure future advances need not definitely specify the amount to be furnished; it is sufficient if it merely specify that it is given to secure such future advances as may be agreed upon. *Ib.*

4. *Same.*

Such a mortgage is sufficient to put a purchaser or incumbrancer on inquiry, and if he fails to make it in the proper quarter, he cannot claim protection as a *bona fide* purchaser. *Ib.*

MULTIFARIOUSNESS—NEGLIGENCE.

MULTIFARIOUSNESS.

Equity. Action for penalty. Pleading.

A bill is not multifarious when the only relief sought by it is the infliction of a penalty prescribed by Sec. 5004, Code of 1906, and which alleges that the trust and combine charged to have been entered into by defendant was unlawful, as such allegation was the foundation of the right to recover the penalty. *Dukate v. Adams*, 433.

MURDER.

1. *Homicide. Previous difficulty. Threats. Exclusion of evidence.*

In a prosecution for homicide where there was a conflict as to how the difficulty began it was error to exclude testimony offered by defendant to show the details of a difficulty between deceased and defendant shortly before the killing and the threats made by the deceased at that time and shortly afterwards against defendant. *Burks v. State*, 87.

2. *Criminal law. Instructions. Harmless error.*

Where accused was indicted for an assault and battery with intent to kill and murder and the evidence only showed an assault with intent to kill, it was harmless error for the court to instruct the jury that if they believed from the evidence beyond all reasonable doubt that defendant was guilty of assault with intent to kill and murder they should find him guilty as charged in the indictment, as under an indictment for an assault and battery with intent to kill and murder a conviction can be had for assault with intent to kill and murder. *Flowers v. State*, 108.

3. *Same.*

The crimes of assault and assault and battery with intent to kill and murder, are merely statutory forms of attempt to commit murder, are both created by the same statute and the punishment for each is the same. *Ib.*

NEGLIGENCE.

1. *Master and servant. Injuries to servant. Question for jury.*

In a suit for the death of a servant while employed as an engineer of a logging train, the questions as to whether the derailment of the train was caused by a defective track, and if so, whether the defect was from the master's negligence were for the jury. *Hooks v. Mills*, 91.

NEGLIGENCE.

NEGLIGENCE—Continued.

2. *Railroads. Injuries to persons on track. Burden of proof. Code of 1906, section 1985. Constitution United States, fourteenth amendment. Review.*

Negligence is the failure to observe, for the protection of the interest of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. *New Orleans, M. & O. R. R. Co. v. Cole*, 173.

3. *Code of 1906, section 1985. Injuries to persons. Burden of proof.*

Under Code of 1906, section 1985, so providing in all actions against railroad companies for injury to persons or property, proof of injury inflicted by the running of locomotives or cars shall be *prima facie* evidence of a lack of reasonable skill on the part of the servants of the company, proof of an injury raises a presumption of negligence, casting the burden of proof on the railroad company. In such case proof that the equipment of a train was proper and that the servants of the company kept a vigilant lookout, is in the absence of any evidence as to the situation of the person injured, not sufficient. *Ib.*

4. *Master and servant. Safe place. Continuing duty.*

The duty of the master to furnish his servant a reasonably safe place to work is a continuing duty, it is not satisfied by putting the place in a reasonably safe condition once, and then allowing it to become dangerous while the servant is at work, but it must be reasonably safe at all times. *Finkbine Lumber Co. v. Cunningham*, 292.

5. *Master and servant. Nondelegable duty. Fellow-servants.*

The duty of the master to furnish his servant a safe place to work and to keep it safe is nondelegable, and the failure of an employee charged with this duty to keep it in that condition was the failure of the master which he could not shift to any other employee. *Ib.*

6. *Master and servant. Injuries to servant. Instructions. Trial.*

In a suit by the engineer of a passenger train against a railroad for personal injury caused by running into an open switch, negligently left open by a freight train brakeman, an instruction that if the "railroad or its employees" were guilty of negligence was not objectionable in that it did not point out what employees were negligent, where the signal act of negligence charged was the leaving of the switch open and the only servant of the defend-

NUISANCE.

NEGLIGENCE—Continued.

ant who could have been guilty of any negligence at all was either the brakesman or conductor in charge of the freight train. *St. Louis & S. F. R. Co. v. Ault*, 341.

7. *Contributory. Defense to gross negligence.*

Mere contributory negligence on the part of plaintiff is no defense to reckless or wanton negligence by the defendant. *Ib.*

8. *Carriers. Breach of contract. Damages.*

Where a passenger is negligently put off or allowed to get off at the wrong station, no case for punitive damages is made, unless there is some reckless, wanton, wilful, capricious or wrongful act done on the part of the agent or servant of the carrier. *G. & S. I. R. R. Co. v. Cole*, 411.

9. *Carriers. Duty to receive passengers. Actions for failure.*

If an intending passenger is at a proper place and in time to catch an approaching street car and could have been seen by the servants of the company in charge of such car by the exercise of due care, then a failure to see such passenger and to stop and take her up is negligence and renders the company liable for damages. *Godfrey v. Railway Co.*, 565.

NUISANCE.

1. *Action. Damages. Successive recoveries.*

The erection of an embankment which causes the obstruction of the natural flow of water and causes damages to the land of another is a continuing nuisance for which successive recoveries can be had. *Rosamond v. Carroll County*, 701.

2. *Judgment. Operative as bar. Prospective damages.*

A declaration, upon which a former recovery was had for damages for a continuing nuisance caused by the erection of an embankment which stopped the natural drainage of water and caused it to overflow plaintiff's land, did not seek to recover prospective damages, although it alleged that the land was permanently damaged; this simply meant that the damage then accrued was permanent—that the reduction in value of the land was permanent and such former recovery is not a bar to damages afterwards accruing from subsequent overflows. *Ib.*

PARTNERSHIP—PENALTIES.

PARTNERSHIP.

1. *Agency. Liability. Foreign judgments. Commercial paper.*

The authority of one partner to bind his copartner is placed solely upon the ground of agency and one partner can bind the other only within the scope of his agency. *Persons v. Oldfield*, 110.

2. *Commercial paper. Burden of proof.*

While it is true that when the firm's name is found upon commercial paper, *prima facie* the firm is bound, yet this cast upon the party attempting to escape liability only the burden of showing that the party signing the name of the firm had no power to do so. *Ib.*

3. *Unauthorized act of partner.*

Where a partner without authority from his co-partner signs the partnership name as surety for another, the co-partner having received no benefit from the transaction, and it being foreign to the firm's business, the co-partner is not bound, even though the obligee was ignorant of the partner's want of authority. *Ib.*

4. *Foreign judgment. Effect.*

A judgment recovered in another state against a partnership only binds the individual member of the firm upon whom process is served and the partnership property of the firm in the other state. *Ib.*

PENALTIES.

1. *Equity. Action for penalty. Pleading. Multifariousness.*

A bill is not multifarious when the only relief sought by it is the infliction of a penalty prescribed by Sec. 5004, Code of 1906, and which alleges that the trust and combine charged to have been entered into by defendant was unlawful, as such allegation was the foundation of the right to recover the penalty. *Dukate v. Adams*, 433.

2. *Forfeitures. Actions to enforce. By whom brought. Code 1906, Sec. 4738.*

Although in Sec. 4738, Code 1906, providing that it shall be the duty of the revenue agent to sue all corporations "for all penalties or forfeitures for all past due obligations and indebtedness of any character whatever owing to the state or any county, etc."

PERJURY.

PENALTIES—Continued.

there is no comma between the words "forfeitures" and "for all past due" the statute will not be held to limit the right of the revenue agent to suits for penalties or forfeitures to those growing out of past due obligations of the state, but will be held to permit him to sue for any penalties or forfeitures. *Dukate v. Adams*, 433.

3. *Anti-trust laws. Actions to enforce. By whom brought. Code 1906, Secs. 4738-5004.*

Sec. 4738 and 5004, Code 1906, are parts of the same Code, were adopted at the same time, and must be construed together, and so construed, the authority granted to the attorney-general and district attorney by Sec. 5004 is not exclusive. *Ib.*

4. *Increase of penalty. Code 1906, Sec. 1746. Laws 1908, Ch. 115. Laws of 1912, Ch. 214.*

Sec. 1746 of the Code of 1906, as amended by Ch. 115 of the Laws of 1908, in regard to the unlawful sale of liquors was not repealed by Ch. 214 of the Laws of 1912, but was only amended so as to impose a more severe penalty for a second and third conviction. *Britton v. State*, 584.

5. *Criminal law. Change of statute. Increase of penalty. Right to object.*

Where pending the prosecution of accused the law is changed so as to provide a more severe penalty for a second or third violation, he cannot complain where he is being prosecuted for a first violation. *Ib.*

PERJURY.

1. *Indictment. Variance.*

An indictment for perjury charging a person with having sworn that "he did not buy certain things" where the evidence shows that the testimony was "that he didn't remember whether he bought or not, that he couldn't recollect," is a fatal variance. *Willoughby v. State*, 60.

2. *Same.*

In order for a conviction to be good in such case the indictment should have alleged substantially what the witness testified to in court, coupled with an averment that in truth and in fact the witness did remember of having bought the thing, that he did recollect of having done so, or words to that effect. *Ib.*

PERPETUITIES—PLEADINGS.

PERJURY—Continued.

3. *Materiality of testimony.*

The false swearing of a witness in a case, in order to constitute perjury, must refer to a matter material to an issue then being tried. *McNiece v. State*, 366.

PERPETUITIES.

1. *Suspension of alienation. Equitable estate. Donee.*

The devise of an equitable estate makes the beneficiary a "donee" under the statute against perpetuities. *Henry v. Henderson*, 751.

2. *Lives in being. Trustees. Code 1906, Sec. 2765.*

The life of a trustee under a will will not be taken into consideration in determining whether a devise is void, as within the statute against perpetuities, Code 1906, Sec. 2765, as equity will not allow a trust to fail for want of a trustee; and when a will gave property to a trustee the proceeds of which were to go to the husband of the testatrix for life, the husband was the first taker under the statute. *Ib.*

3. *Same.*

Where a will devised the remainder of the real estate of the testatrix, to her two nephews, and at their death to go to the heirs "of their bodies," and that the income of said property should be applied to the payment of certain annuities and legacies, and further provided that the entire estate should be kept intact during the life of the husband of testatrix, and the income should be devoted to his support; in such case as a construction of the will which would pass to a surviving nephew the estate granted the other, would create a succession of three lives before the vesting of the fee, the husband being a "donee" within the statute against perpetuities, the fee will be held to pass to the heirs of a nephew upon his death, rather than upon the death of the surviving nephew. *Ib.*

PLEADINGS.

1. *Right to amend.*

Courts of law are organized for the purpose of trying causes on their merits, and only in exceptional cases should the trial court refuse to permit amendment of pleadings or proceedings. *Grocery Co. v. Bennett*, 573.

PRINCIPAL AND AGENT.

PLEADINGS—Continued.

2. *Construction. Default.*

The universal rule of pleading is that pleadings are to be construed most strongly against the pleader and no judgment by default should be rendered where the declaration wholly fails to state any cause of action. *Odom v. Railroad*, 642.

3. *Exception.*

Exceptions to an answer lie only to an insufficient discovery, and not to the legal sufficiency of matter set up therein as an affirmative defense to the relief prayed for. *Rosamond v. Carroll County*, 701.

4. *Guardian ad litem. Next friend. Actions.*

When a person bringing suit for a minor ward styles himself in the pleadings as "guardian *ad litem*," when in fact he is suing as "next friend," he will be treated as such and the courts will not look with critical eyes on the characterization which the next friend chooses to give himself in the pleadings. *Indemnity Co. v. State for use of Gillaspy*, 703.

5. *Criminal law. Demurrer.*

A demurrer to a plea is a confession of the truthfulness of the averments of the plea. *Smith v. State*, 853.

6. *Replication. Demurrer.*

A demurrer to a replication admits the facts therein stated. *Taylor v. State*, 857.

PRINCIPAL AND AGENT.

1. *Laws of 1908, chapter 118, section 1. Bucket shops.*

Section 1 of the Laws of 1908 deals alone with what are known as "bucket shops," and places maintained to receive orders for this class of business, and those persons who are engaged in the management or conducting of this kind of business either as principal or agent. *Ascher & Baxter v. Moyse & Co.*, 36.

2. *Partnership. Liability. Foreign judgments. Commercial paper.*

The authority of one partner to bind his copartner is placed solely upon the ground of agency and one partner can bind the other only within the scope of his agency. *Persons v. Oldfield*, 110.

3. *Intoxication of agent. Grounds of discharge.*

Intoxication covering a period of two or three months on the part of an agent employed as a cotton buyer, to such an extent

PRINCIPAL AND AGENT.

PRINCIPAL AND AGENT—Continued.

as to incapacitate him for business, justifies his discharge before the termination of his contract for service, although at the time of the discharge he had quit drinking, as the employer was under no obligation to take further risk. *Willis v. Lowery*, 118.

4. *Malicious prosecution. Liability for agent's acts.*

The principal is liable for the acts of his agent in instituting a criminal prosecution maliciously and without probable cause, if the institution of such prosecution was expressly authorized or subsequently ratified by the principal, or was within the scope of the agent's employment. *Fisher v. Westmoreland*, 180.

5. *Same.*

Authority from the principal to an agent to sell property, does not confer authority to prosecute for theft of such property. An expressed authority to prosecute one person, excludes any authority to prosecute another. *Ib.*

6. *Same.*

As a caretaker of the property of a principal an agent is authorized to do any and all things necessary to enable him to take care of and preserve the property but this authority extends no further. If necessary to prevent a person from stealing the property, he is authorized to cause the arrest of such person, not in order to punish him, but to prevent the theft, and in such case an agent has no implied authority to prosecute after an alleged theft has been committed. *Ib.*

7. *Contracts for benefit of third parties. Pleading. Matters of Implication.*

Where a contract is made with a carrier by a wife for her husband's benefit the husband has a right to bring suit for its breach in his own name. *Canada v. Y. & M. V. R. R. Co.*, 274.

8. *Same.*

Where in such case, the declaration alleges that the contract sued on was made with an agent of the defendant carrier, this carries with it the inference that in making it the agent acted within the scope of his authority. *Ib.*

9. *Unauthorized act of agent. Effect on principal.*

The acts of an agent in excess of his real or apparent authority are not binding upon his principal. *Odd Fellows Benefit Assn. v. Smith*, 332.

PRINCIPAL AND AGENT.

PRINCIPAL AND AGENT—Continued.

10. *Same.*

The limitations upon the authority of an agent, known to persons dealing with him, are binding upon such person, and they can acquire no rights against the principal by dealing with the agent contrary thereto. *Odd Fellows Benefit Assn. v. Smith*, 332.

11. *Same.*

In determining whether the limitations placed by the principal on his agent's authority have been waived by reason of a custom of the agent to act in violation thereof, one of the essential facts to be determined is whether or not such custom on the part of the agent was known to, and acquiesced in, by the principal. *Ib.*

12. *Principal and agent. Evidence of agency.*

The statement of an agent as to his agency has no probative value to establish such agency. *Sumrall v. Kitselman Bros.*, 783.

13. *Sales. Suit for price. Liability.*

Where plaintiff's agent took an order from defendant for a bill of wire and also took orders from several others for wire and shipped the total amount to defendant without his knowledge and defendant by agreement with the agent paid the freight on the whole shipment, a part of which was refunded to him by the selling agent, and defendant took from the carrier's station the part of the goods which he had ordered, in such case defendant was not liable for the total shipment but only for the part he had ordered and taken out. *Ib.*

14. *Agent's authority. Third person.*

Where an agent authorized to sell but not to collect, sells goods to a purchaser and collects the purchase money but fails to turn it over to his principal, the purchaser is not released thereby as he dealt with the agent at his peril; he should have inquired and satisfied himself as to the agent's authority to collect. *Ib.*

15. *Libel and slander. Right of action. Defenses. Apology. Mitigation of damages. Code 1906, Sec. 10.*

In a suit for damages against a principal for defamatory words spoken by an agent while engaged in his master's business, an apology made by the principal not by reason of any promise expressed or implied, that it would constitute full reparation for the injury inflicted, cannot be pleaded in bar of the action, but is admissible in evidence and can be considered by the jury in mitigation of damages. *Fire Insurance Co. v. Betty*, 880.

PROBATE COURT—RAILROADS.

PRINCIPAL AND AGENT—Continued.

16. *Code of 1906, Sec. 10.*

Code 1906, Sec. 10, by which certain words are made actionable has no application in a suit to hold a principal liable for words spoken by an agent unless possibly such words are spoken at the command of the principal. *Ib.*

PROBATE COURTS.

Estate of decedents. Claims. Probation. Record. Sufficiency.

The supreme court will affirm a decree of the chancery court sustaining objections of an administrator to the allowance of claims against the estate of a decedent, on the ground that the claims were not probated as required by law, where the record does not contain the evidence of debt attempted to be probated. *Horne v. McAlpin*, 129.

PUNISHMENT.

1. *Equity. Report of master. Punitive damages. When awarded.*

Punitive damages are awarded by way of punishment, and the imposition of this punishment in a suit in chancery lies as completely in the discretion of the chancellor as it does in the jury in cases tried by a jury. *Hines v. Naval Store Co.*, 802.

2. *Same.*

Whether or not this punishment shall be imposed is not a question of fact at all, and consequently the recommendation of the master relative thereto, may be followed by the chancellor or not, as in his judgment may seem best under all the circumstances in the case. *Ib.*

RAILROADS.

1. *Negligence. Injuries to persons on track. Burden of proof. Code of 1906, section 1985. Constitution United States, fourteenth amendment. Review.*

Negligence is the failure to observe, for the protection of the interest of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. *New Orleans, M. & O. R. R. Co. v. Cole*, 173.

2. *Code of 1906, section 1985. Injuries to persons. Burden of proof.*

Under Code of 1906, section 1985, so providing in all actions against railroad companies for injury to persons or property, proof of

RAILROADS.

RAILROADS—Continued.

injury inflicted by the running of locomotives or cars shall be *prima facie* evidence of a lack of reasonable skill on the part of the servants of the company, proof of an injury raises a presumption of negligence, casting the burden of proof on the railroad company. In such case proof that the equipment of a train was proper and that the servants of the company kept a vigilant lookout, is in the absence of any evidence as to the situation of the person injured, not sufficient. *New Orleans, M. & C. R. R. Co. v. Cole*, 173.

3. *Code of 1906, section 1985. Constitution of United States, fourteenth amendment.*

Section 1985 of the Code of 1906 is not in conflict with the fourteenth amendment to the federal constitution, in that it does not deprive a railroad company of the equal protection of the laws and of its property without due process of law. *Ib.*

4. *Injury to persons at station. Duty of Agent. Pleading.*

A railroad owes no duty to the public to supply general peace officers for the state. The agents of public carriers are placed in its depots for the purpose of aiding and assisting in the discharge of its public duties. When a person seeks to claim protection from insult and abuse, and to hold a railroad company liable for failure to give protection, such person must prove that he was at the depot for the purpose of transacting some business with the agent in connection with the service he is to render the railroad company in discharging its duty to the public in the business in which it is engaged. *Odom v. Railroad Co.*, 642.

5. *Injury to persons at station. Duty of agent.*

In a suit against a railroad company for a failure of its station agent to protect plaintiff from insult and abuse, a declaration which does not state that plaintiff went to the depot to see the agent on any matter connected with the business of the company but simply alleges that he "went to the depot for the purpose of transacting business with the agent of defendant" fails to state a cause of action. *Ib.*

6. *Same. Code 1906, Sec. 4867.*

Sec. 4867, Code 1906, is not intended to make the depot agent a general officer of the state. The authority conferred upon them by this section is intended for use as the agents of the railroad company, to enable them more completely to discharge the duty that rested on the railroad company, before the enactment of

 RECEIVER—REPLEVIN.

RAILROADS—Continued.

the statute to protect any member of the public who go depot to transact railroad business. *Ib.*

7. *Operation. Injuries to persons on track. Rate of speed.*

It is negligence in a railroad company to run its train nighttime at such a speed that it is impossible, by the ordinary means and appliances, to stop the train within distance in which obstructions upon the track can be seen aid of the headlight of the engine, and if anything in such conditions and circumstances suggest an increase of care operation of a railroad train to avoid peril and danger duty to increase such care proportionately increases, rule applies to the country and sparsely settled as well as to cities where there is a speed limit by law. *Co. v. Moore*, 768.

8. *Same.*

To run a railroad train at night propelled by the power of steam or electricity through an incorporated city and in violation of the statute at such a rate of speed make it impossible, by the exercise of ordinary care, to stop the train within the distance shown by the glare of the light of the engine, is such reckless conduct amounting to wilfulness as will justify the imposition of punitive damages in favor of one struck on its tracks and injured thereby.

9. *Carriers. Transportation of dead bodies. Punitive damages. Sufficiency of evidence.*

In a suit for punitive damages, wherein gross negligence is charged on the part of the railroad employees which in the dropping of a box containing the corpse of a child while loading the same into a baggage car, evidence not sufficient to charge the defendant's employees with recklessness, recklessness or wilfulness, such as to warrant infliction of punitive damages. *Railroad Co. v. James*, 7

RECEIVER.

See CORPORATIONS.

REPLEVIN.

1. *Assessment of value. Writ of inquiry.*

Where in an action of replevin for two horses the case assessed the value of the two horses the jury

horses the jury
to assess the value
whether by

SALES.

REPLEVIN—Continued.

and were discharged. It was proper for the court to award a writ of inquiry and submit to another jury the question of their separate values. *Johnson v. Tabor*, 78.

2. *Justice of the peace. Jurisdiction. Affidavit.*

The test of the jurisdiction of a justice of the peace in an action of replevin is not the value of the property as found by the jury, but the value as alleged in the affidavit, unless the property therein is knowingly over-valued or under-valued for jurisdictional purposes. *Ib.*

3. *Justice of the peace. Jurisdiction. Judgment. Remittitur.*

The affidavit on which replevin is begun, before a justice of the peace, is not only the basis for the issuance of the writ, but also the written statement of the plaintiff's cause of action and he cannot recover judgment for a greater value than alleged therein. *Ib.*

4. *Exchange of property. Right of action. Title.*

Where plaintiff agreed with defendant to exchange an automobile for a launch but neither party delivered the article agreed to be exchanged, the contract was executory and plaintiff having no title to the launch could not recover in replevin for the same. *Wachstetter v. Brown*, 546.

SALES.

1. *Purchase money. Payment. Condition precedent. Intention.*

The term "purchase money" as used in section 4779, Code 1906, means simply the compensation or consideration which the seller is to receive for the property. *Johnson v. Tabor*, 78.

2. *Same.*

Under section 4779, Code 1906, to make a valid sale it is not necessary for the "purchase money" to be paid in coin or currency. It may be paid in anything of value which the parties agree upon and which the seller is willing to receive in payment, and credit given the seller upon his indebtedness, and his actual discharge from any further obligation to pay the same, to the extent of the agreed value of the property, constitutes a payment of the purchase money. *Ib.*

3. *Sale of personal property. Delivery.*

Where a sale of personal property is otherwise complete, delivery as between the parties to the contract is not necessary, in order

SALES.

SALES—Continued.

to invest the purchaser with the title thereto, unless delivery is required by the contract, as a condition precedent to the vesting of the title and the completion of the sale. *Ib.*

4. *Same.*

Whether or not delivery is a condition precedent to a sale becoming absolute is a matter of intention, and under the evidence in this case it was for the jury to say what was the intention of the parties. *Ib.*

5. *Bills and notes. Assignee of bona fide purchaser. Rights.*

Where a party executed his note to a savings bank for the purchase of a certificate of deposit, for an equal amount, drawing a higher rate of interest, and the note was deposited by the savings bank with another bank as security for a debt and the latter bank took it before maturity and without notice of any defense thereto; and after the note matured and the savings bank failed, the other bank attempted to collect the note and there was no notice of a set off made until the other bank sold the note at public auction to plaintiff after maturity, at which sale the maker of the note gave notice of his alleged right to set off his certificate of deposit. *Held*, that plaintiff having acquired the note from the bank which was a holder in good faith, was himself a bona fide holder for value, and that the certificate of deposit was, therefore, not available as a set off as against plaintiff's rights. *Sanders v. McAlister & Co.*, 227.

6. *Warranty. Waiver of breach. Evidence. Necessity of objection.*

Where a buyer purchased a certain amount of cotton seed cake to be delivered to him at a certain point, quantity and quality being guaranteed by the seller, at destination and the buyer paid for more cotton seed cake than he received, he was entitled to collect from the seller the excess so paid. *Fox v. Baggett*, 519.

7. *Same.*

In such case it is immaterial that the cotton seed cake which was shipped loose in cars, was sacked by the buyer before it was weighed or that it was removed before it was delivered to the buyer at destination, if it sufficiently appears that all of the cake which reached the destination was sacked and weighed by the buyer. *Ib.*

8. *Remedies of buyer. Items of damage.*

Where a party buys an engine which is worthless, and rejects the same on that account he is entitled to recover of the seller all

SCOPE OF INJURY—SPECIAL LAWS.

SALES—Continued.

damages he has sustained by the seller's breach of contract including freight paid by him on the engine and a reasonable sum for storing and caring for the engine, unless he was directed by the seller not to store and care for it. *Ash v. Harvester Co.*, 542.

SCOPE OF INJURY.

Landlord and tenant. Action for damages.

Where a lease to a grantee to extract turpentine from trees was for a term of three years from the date of boxing, the grantor reserving the right to designate what timber should be first boxed and the boxing of the timber was not begun until after the expiration of seven years from the date of the lease, and when begun the land had been purchased by plaintiff who brought suit against the vendees claiming damages by reason of the vendee having without his consent boxed and extracted turpentine and rosin from a large number of trees on the leased lands, and claiming that the boxing did not begin in a reasonable time, the time when boxing should begin not being specified in the lease, in such a suit the question of the reasonableness or unreasonableness of the lease cannot be drawn in question. *Hines v. Naval Store Co.*, 802.

SPECIAL LAWS.

1. *Constitution 1890, Sec. 90, Par. Q. Drainage. Natural Water Courses. Ch. 147, Acts of 1908.*

Acts of 1908, Ch. 147, is a special and local law creating a special drainage district, with the object and purpose to provide adequate and effectual drainage by artificial drains or "other drainage facilities" and for shortening and improving the "natural channels and water ways" in said district, and is therefore violative of Constitution of 1890, Par. Q, prohibiting the legislature from making special laws relating to water courses, fences and stock. *Crenshaw v. State*, 457.

2. *Constitution 1890, Sec. 87. Local laws. Limitation of actions.*

Constitution 1890, Sec. 87, prohibiting the enactment of special or local laws or the suspension of general laws, etc., is not violated by Sec. 2575, Code 1906, permitting insurance companies to make contracts limiting the time in which suits can be brought thereon to not less than one year. *Taylor v. Insurance Co.*, 480.

STATE PRIORITY.

STATE PRIORITY.

1. *Priority of state as creditor.*

In the absence of statutory or constitutional authority, the state, as sovereign, has no preferential rights in this state. *Potter v. Fidelity & Deposit Co.*, 823.

2. *Statute in derogation of sovereignty. Construction.*

When the state's sovereignty is involved in any statute, statutes in derogation thereof are to be strictly construed in favor of the state, but the state sovereignty is not involved where the question is one of priority merely. *Ib.*

3. *Depositaries. Statutes in derogation of common right. Code 1906, Sec. 3485.*

Code 1906, Sec. 3485 giving priority to the state over general creditors is a statute in derogation of common right, and such statutes are to be strictly construed as against parties, asserting claims by virtue of such statutes. *Ib.*

4. *Priority of state as creditor. Code 1906, Sec. 3485. Laws 1908, Ch. 96.*

Sec. 3485, Code of 1906, was not repealed or intended to be repealed by Ch. 96 of Laws of 1908. It still stands as security to the state for all deposits of its money made by any person, in case of the insolvency of the institution where the deposit is made in all cases where any deposit is not made by virtue of its authority under the depository law of 1908. But when the state itself disposes of its public funds as is required by its depository laws, the relation of debtor and creditor is established between the state and the depository, merely, and the state must make its money, in the event of the insolvency of the depository out of its securities, and failing in this must share the assets pro rata with the other creditors. *Ib.*

5. *Same.*

When funds are placed by the state in a depository as provided by Laws 1908, Ch. 96, they are not "trust funds" within any meaning or purpose provided for by Sec. 3485, Code of 1906. *Ib.*

6. *Same.*

Where a bank selected as a state depository afterwards became insolvent and went into the hands of a receiver and the surety of such bank paid to the state the money owed by the bank and afterwards sued the receiver of the bank, to establish a right of

STATUTES OF LIMITATIONS—STATUTES REPEALED.

STATE PRIORITY—Continued.

subrogation to the state's alleged right of priority over the general creditors, such surety had no right of subrogation to priority over general creditors because the state itself had no such right. *Potter v. Fidelity & Deposit Co.*, 823.

STATUTE OF LIMITATIONS.

1. *Time of taking appeal. Limitation. Appearance. Citation. Delay in prosecuting. Dismissal. Code 1906, section 4906.*

An appeal is perfected by the filing of an appeal bond within two years after decree which stops the running of the statute of limitations, though no citation is served. *McAllister v. Richardson*, 132.

2. *Promissory note. Time of payment. Statute of limitations.*

Where a promissory note provided for payment on demand or on the death of the maker, suit could be brought either before or after the death of the maker, but the statute of limitations will not commence to run until after his death. *Harris v. Townsend*, 590.

3. *Remainder. Limitations. Computation of period. Accrual of right.*

Where land was devised to the testator's children for life, with the remainder of each in the other children for their life, and the remainder in fee to the surviving children of such children, a suit by the children of one of them to assert their right in the portion of a daughter who died childless in 1877, being predeceased by one of her brothers without issue, was not barred by the statute of limitations, where the only other child of the testator and the father of plaintiff died only a short time before the bringing of the suit. *Whitfield v. Miles*, 734.

STATUTES REPEALED.

1. *Taxation. Refund of tax. Statutory provisions. Repeal. Reservation.*

The repeal of a statute without any reservation takes away all remedies given by the repealed statute, and defeats all actions pending under it at the time of its repeal. The rule is especially applicable to the repeal of a statute creating a cause of action, providing a remedy not known to the common law, or conferring jurisdiction where it did not exist before, and is carried to such an extent as to abate proceedings pending upon appeal after verdict in favor of plaintiff. *Town of Durant v. Attala County*, 286.

SUPREME COURT.

STATUTES REPEALED—Continued.

2. *Same.*

Everything falls with the abrogated law not fully executed under it, except where contract rights have vested. Especially is this true in matters of taxation. *Ib.*

SUPREME COURT.

1. *Questions Reviewable.*

The supreme court is strictly a court of review and only in rare instances will the court consider, the merits of a controversy, unless passed upon in the lower court. *Ascher & Baxter v. Moyse & Co.*, 36.

2. *Same.*

Where the lower court erroneously dismissed a bill on the ground that the plaintiff could not sue, the supreme court will not pass upon the merits but remand the cause to the lower court. *Ib.*

3. *Municipal ordinance. Appeal to circuit court.*

Where a criminal case is tried in a mayor's court for a violation of a municipal ordinance, it can not be tried on appeal in the circuit court as a violation of the state law. *Thomas v. State*, 74.

4. *Same.*

In such case the proper disposition of the case in the supreme court is to reverse the judgment, and remand the case, to be proceeded with as a prosecution by the city. *Ib.*

5. *Replevin. Judgment. Remittitur.*

In case the jury award a greater value than claimed in the affidavit in replevin the supreme court will require a remittitur to the amount claimed in the affidavit before affirming the case. *Johnson v. Tabor*, 78.

6. *Estate of decedents. Claims. Probation. Record. Sufficiency.*

The supreme court will affirm a decree of the chancery court, sustaining objections of an administrator to the allowance of claims against the estate of a decedent, on the ground that the claims were not probated as required by law, where the record does not contain the evidence of debt attempted to be probated. *Horne v. McAlpin*, 129.

7. *Appeal and error. Delay in prosecution. Dismissal.*

Where the record in a cause had been filed in the supreme court and appellees appearance had been entered more than ten

TAXATION.

SUPREME COURT—Continued.

days prior to the return day for an appeal there was no such delay in the prosecution of the cause after taking the appeal as will warrant a dismissal. *McAllister v. Richardson*, 132.

8. *Appeal. Record. Conclusiveness.*

The supreme court on appeal, must accept as true the statement of the trial court of its recollection of the proceedings sought to be reviewed. *Gurley v. State*, 190.

9. *Appeal and error. Jurisdiction. Supersedeas bond. Dismissal. Liability on bond.*

The supreme court has no jurisdiction to discharge a *supersedeas* bond on motion where such bond has served the purpose for which it was given, on the grounds that the sureties were misled into signing it and that one of them notified the clerk before the bond was filed not to approve it, nor could the supreme court discharge such bond on an original proceeding in said court. *Douglas v. Parsons-May-Oberschmidt Co.*, 620.

TAXATION.

1. *Interstate commerce. Privilege tax.*

A state cannot impose a tax on the privilege of operating a ferry engaged exclusively in carrying passengers across a river from one state to another, as this would be a burden on interstate commerce. *Ferry Co. v. State*, 65.

2. *Refund of tax. Statutory provisions. Repeal. Reservation.*

The repeal of a statute without any reservation takes away all remedies given by the repealed statute, and defeats all actions pending under it at the time of its repeal. The rule is especially applicable to the repeal of a statute creating a cause of action, providing a remedy not known to the common law, or conferring jurisdiction where it did not exist before, and is carried to such an extent as to abate proceedings pending upon appeal after verdict in favor of plaintiff. *Town of Durant v. Attala County*, 286.

3. *Same.*

Everything falls with the abrogated law not fully executed under it, except where contract rights have vested. Especially is this true in matters of taxation. *Ib.*

TAX SALES AND DEEDS.

TAXATION—Continued.

4. *Licenses. Commerce. Privilege Tax. Statutes. Constitution United States, Art. 1, Secs. 8-10. Constitution Miss., Sec. 112. Code 1906, Secs. 3497-3498. Laws 1908, Ch. 192.*

Code 1906, Sec. 3498, as amended by Laws 1908, Ch. 192, providing that in addition to the privilege license imposed by Sec. 3497, Code 1906, which imposes a tax on canning factories, there shall be paid a tax fee of three cents per barrel upon all oysters canned and packed in and all oysters shipped raw in or from this state, etc., provides a method for the collection of an additional privilege tax to that imposed in section 3497, and the whole tax must be paid by the local party engaged in taking or canning oysters, in the or by the local dealers selling or shipping oysters, as a privilege tax for conducting the business in this state, and so construed the statute does not interfere with interstate commerce, in violation of the Constitution of the United States, Art. 1, Sec. 8, nor impose duties on imports or exports in violation of Art. 1, Sec. 10, of that Constitution, nor does it destroy the equality and uniformity of the taxation laws in violation of the Constitution of 1890, Sec. 112. *Canning Co. v. State*, 890.

5. *Same.*

The constitutional requirement as to uniformity of taxation has no reference to taxation of occupations. *Ib.*

TAX SALES AND DEEDS.

1. *Sale. Validity.*

A sale of the land for taxes is void, where at the time of such sale the lands are assessed to the state, and the fact that before the sale was had, some one drew a line through the word "state" on the assessment roll does not validate the sale, as such change did not constitute an assessment of the land to unknown owners. *Smith v. Leavenworth*, 238.

2. *Code 1892, Section 2735. Tax title. Possession.*

By virtue of Code of 1892, section 2735, so providing when a party and his grantor have been in possession of land for three years under a tax deed, he obtains a good title, even though the tax deed was void. *Ib.*

3. *Deed. Alluvion. Title.*

A tax deed describing the property as "all fractional section 24, township 27, range 7 west, in Coahoma County;" conveys title to.

WILLS.

TAX SALES AND DEEDS—Continued.

the alluvion which has been formed by the river adjoining said section 24. *Smith v. Leavenworth*, 238.

4. *Code of 1906, Sections 4338-4326. Tax sale. Filing deed. Time of sale.*

Where a tax collector filed a conveyance of land sold to an individual for taxes in the office of the clerk of the chancery court of the county as provided under Code of 1906, section 4338 and such deed remained there for two years from the date of sale, not being sooner redeemed. Such deed being in a vault in the chancery clerk's office and remaining therein after the destruction of the court house by fire, the vault not being destroyed, this was a sufficient compliance with the statute. *Simpson v. Interstate Cooperage Co.*, 312.

5. *Taxation. Tax sale. Time of sale. Code of 1906, sections 4326-4328.*

A sale of land by the tax collector for unpaid taxes on the first Monday of March as provided for under section 4328, Code of 1906, is valid, although section 4326, Code of 1906, provides that a tax collector shall advertise all lands in his county on which taxes have not been paid on the first Monday of April following, since the requirements of section 4326 are not necessary to be observed to have a valid sale. *Ib.*

6. *Life estates. Right to purchase. Wife of tenant.*

A husband cannot assert a tax title against his remainderman or tenant in common, and the same disability attaches to his wife and her purchase of a tax title in such case operates as a redemption of the land for the interest of the life tenant and remainderman. *Whitfield v. Miles*, 734.

WILLS.

1. *Codicil. Revocation. Insurance. Beneficiaries. Section 5079, Code 1906.*

A codicil to a will not being subscribed and witnessed as required by law is invalid and does not affect the validity of the will since Code 1906, section 5079 provides that a "demise or any clause thereof shall not be revocable but by the testator or testatrix, destroying, cancelling or obliterating the same, or causing it to be done in his or her presence or by a subsequent will, codicil or declaration in writing made and executed." *Hawkins v. Daberry*, 17.

WILLS.

WILLS—Continued.

2. Insurance. Beneficiaries.

A person insured in a mutual benefit association cannot make a valid bequest of the benefits, to one who does not belong to the class of persons who are authorized to become beneficiaries under the laws, constitution and charter of such order. *Ib.*

3. Construction. Rule of descent. Tenants in common. Improvements.

Where a testator directed in his will that the cotton on hand be sold as soon as possible and the money turned over to his wife, the proceeds of the cotton were devised to her absolutely. *Eaton v. Broaderick*, 26.

4. Construction. Rule of descent.

Personal property not disposed of by the testator's will passes under the statute of descent and distribution to the widow and testator's children and grandchildren according to that statute. *Ib.*

5. Construction.

Where by will the testator directed that his land should not be sold until his wife's death, and that then it should be sold, and that notes due him should be collected and the money remain in his wife's hands until her death, such a provision vested a life estate in the widow in the land and in the proceeds of the notes by necessary implication. *Ib.*

6. Tenants in common. Improvements.

Where a will provided that no child of the testator should interfere with another's improvements upon the testator's land, and that each child owned the improvements which such child had made and that the land should be divided equally among the children after the death of the widow, the children who take as tenants in common, were entitled to the improvements made severally by them without being charged rent thereon, and if possible have allotted to them the land on which such improvements may have been erected. *Ib.*

7. Testamentary trustee. Power of sale. "Proceeds."

If a sale of the real estate is necessary to carry out the purpose of the testator, the power of the testamentary trustee to make the sale will be given by implication as otherwise the intention of the testator might be defeated. *Corley v. Bishop*, 490.

WILLS.

WILLS—Continued.

8. *Same.*

Where under the provisions of a will the duty was imposed upon a testamentary trustee to distribute the "proceeds" of real and personal property equally between the beneficiaries, from the use of the word "proceeds" the inference must be that a sale of the property was implied. *Corley v. Bishop*, 490.

9. *Executors. Undetermined share. Power of court. Remainders.*

Where a testator by will devised certain lands to his daughter and certain other lands to a son and provided that the lands devised to both should "be valued by three disinterested persons" to be appointed by the judge of the probate court and that if it was found that the lands devised to the daughter were materially less than the lands devised to the son, then he also devised to her a sufficient quantity of other lands, not otherwise devised as will make their lands of equal value and that such other lands should be selected for his daughter by his executors. And where after the probate of such will the court appointed commissioners and empowered them not only to value but also to divide the estate which they accordingly did and reported their action to the court which was confirmed, without objection by the executors, in such case the executors will be conclusively presumed to have adopted the acts of the commissioners as their own. *Whitfield v. Miles*, 734.

10. *Same.*

In such case when the will was probated the daughter became not only entitled to the lands specifically devised to her but she also became entitled, as a matter of right, to such additional quantity of land as would make the lands specifically given to her equal in value to that of her brother, and there was no discretion left in the executors as to whether or not they would allow her this land. *Ib.*

11. *Same.*

Under the terms of this will, there was not only a life estate created in an undivided interest in this land in the daughter until the selection was made, but there was also a vested right in the remainderman, which the trustees could not defeat and which her surviving brother could not convey beyond a life interest in the same. *Ib.*

12. *Remainder. Limitations. Computation of period. Accrual of right.*

Where land was devised to the testator's children for life, with the remainder of each in the other children for their life, and

WILLS.

WILLS—Continued.

the remainder in fee to the surviving children of such children, a suit by the children of one of them to assert their right in the portion of a daughter who died childless in 1877, being predeceased by one of her brothers without issue, was not barred by the statute of limitations, where the only other child of the testator and the father of plaintiff died only a short time before the bringing of the suit. *Ib.*

13. *Construction.*

In the construction of wills it is the duty of courts to ascertain the intention of the testator and to enforce such intention provided it is lawful. *Henry v. Henderson*, 751.

14. *Same.*

Where a will is susceptible of two reasonable constructions, one valid and the other invalid, the former construction must prevail. *Ib.*

15. *Perpetuities. Suspension of alienations. Equitable estate. Donee.*

The devise of an equitable estate makes the beneficiary a "donee" under the statute against perpetuities. *Ib.*

16. *Perpetuities. Lives in being. Trustees. Code 1906, Sec. 2765.*

The life of a trustee under a will will not be taken into consideration in determining whether a devise is void, as within the statute against perpetuities, Code 1906, Sec. 2765, as equity will not allow a trust to fail for want of a trustee; and when a will gave property to a trustee the proceeds of which were to go to the husband of the testatrix for life, the husband was the first taker under the statute. *Ib.*

17. *Construction as a whole.*

In construing a will, the whole text must be taken into consideration in order to ascertain the meaning of the testatrix so that, where it is apparent that it was the intention of a testatrix to give her nephews a tenancy in common in lands to go to the heirs of "their bodies at their death" and the next preceding section clearly expresses an intention that the survivor shall take the whole of the proceeds of realty, the omission will be deemed to be intentional, and the provision will be construed to pass the fee to the heirs of either of the nephews at his death, rather than at the death of the survivor. *Ib.*

18. *Construction. Cross remainders.*

A cross remainder can exist only in two ways: First, by express words; or second, by implication. *Ib.*

WILLS.

WILLS—Continued.

19. *Same.*

A will should never be construed so as to create a cross remainder by implication, when in so doing the will is destroyed, because a cross remainder by implication arises only in order to prevent a chasm. *Henry v. Henderson*, 751.

20. *Construction in favor of the instrument. Lives in being. Perpetuities. Donee. Code of 1906, Sec. 2765.*

The real meaning of Code of 1906, Sec. 2765, is that there shall be no fees tail, that is, you shall not tie up lands by binding it to the heirs of the body generally or specially but you may give it in succession to persons then living, not exceeding two and the heirs of the body of the survivor. *Ib.*

21. *Same.*

Where a will devised the remainder of the real estate of the testatrix, to her two nephews, and at their death to go to the heirs "of their bodies," and that the income of said property should be applied to the payment of certain annuities and legacies, and further provided that the entire estate should be kept intact during the life of the husband of testatrix, and the income should be devoted to his support; in such case as a construction of the will which would pass to a surviving nephew the estate granted the other, would create a succession of three lives before the vesting of the fee, the husband being a "donee" within the statute against perpetuities, the fee will be held to pass to the heirs of a nephew upon his death, rather than upon the death of the surviving nephew. *Ib.*

22. *Wills. Trust. Construction. Precatory Trust. Mandatory Trust.*

Where the will of a testator by the first item left all of his property to his wife for her natural life, subject to the limitations and charges thereafter set out, and by the second item provided that should the income of the estate permit, of which he constituted his executrix the judge, he desired aid extended any member of his family who may be overtaken by adversity, and by the fourth item provided that should a certain daughter become dependent and in need he charged his wife who was executrix out of the body of his estate to extend to her such aid, as the income, in justice to herself and the other dependent members of the family, enables her to do but not to exceed the sum of three hundred dollars per annum. *Held*, that the words employed in item two were precatory and the discretion was

WITNESSES.

WILLS—Continued.

given the executrix to extend aid to the class mentioned if she deemed it wise to do so; but that the provision for his daughter in item four was mandatory and might in case of her necessity be enforced out of the corpus of the estate. *Patterson v. Humphries*, 831.

WITNESSES.

Actions against estates. Witnesses. Competency. Best evidence. Gifts. Code 1906, Sec. 1917.

In a controversy between the heirs of a decedent over personal property claimed to have been given one of them by decedent before his death, the testimony of the donee of the gift is not admissible to establish his claim to the property, since Code 1906, Sec. 1917, provides that no person shall testify as a witness to establish his own claim or defense against the estate of a deceased person, which originated during his lifetime. *Baldridge v. Stribling*, 666.

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